165 US 707

163 US 707

TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1895.

No. 923.

THE SUN INSURANCE OFFICE OF LONDON, ENGLAND, PLAINTIFF IN ERROR,

vs.

THE INTERNATIONAL TRUST COMPANY OF DENVER, COLORADO, DEFENDANT IN ERROR.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

or owners, any such emergency as to forbid careful consideration and deliberation. Yet the District Judge did not, apparently, observe this paragraph, or the significance of it. He passed it over without mention, and commenced his quotation at the next succeeding paragraph (*Opinion, Record, p. 177*).

The opinion of the District Judge, from his failure to notice these proofs, loses the weight it otherwise would carry.

It is, however, difficult to understand how he could, upon any reading of the proofs, give a decree of $10,000 to the *Dauntless* for bringing the *Chaudeboye* to a port where her owners did not want her, when others were ready to render such service at less than one third the price.

Two Savannah tugs were ready to start out at once and bring the *Chaudeboye* to Savannah for $4,000, or $2,000 for each (*Harris, p. 131*).

The *Orion*, a vessel of three times the power of the *Dauntless*, offered to do the work for $3,500 (*Harris, pp. 129, 130*).

The owners of the *Morse*, a vessel of ten times the tonnage of the *Dauntless* (*Blaisdell, p. [illegible]*) and of three times the power, were ready to send her for such service for $3,000 (*Harris, p. 130*).

The Moran Towing Co., of New York, understood from Minis & Co.'s telegram that two tugs were needed, and were ready to send "two large, powerful tugs" to take the *Chaudeboye* to Savannah for $6,000, or $3,000 apiece (*Harris, p. 130*).

The owners of the *Chaudeboye* rejected all these offers, and accepted the offer of the *Morse* to tow the *Chaudeboye* to Vera Cruz, her port of destination, for $5,000 (*Harris, p. 130; Morse, p. 119*). Their wise and careful plans were frustrated by the interference of the libellant.

The petition for a writ of *certiorari* should be denied, unless it is the desire of the Supreme Court to hear the case anew in order to make a decree in conformity with the vigorous and healthful opinion of Judge GOFF, that the libel should be dismissed with costs in all courts.

BUTLER, NOTMAN, JOLINE & MYNDERSE,
Proctors for Strickland.

WILHELMUS MYNDERSE,
Advocate.

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UNITED STATES CIRCUIT COURT OF APPEALS
EIGHTH CIRCUIT.

DECEMBER TERM, 1895.

No. 663.

THE SUN INSURANCE OFFICE OF LONDON, ENGLAND,
PLAINTIFF IN ERROR,

vs.

THE INTERNATIONAL TRUST COMPANY OF DENVER,
COLORADO, DEFENDANT IN ERROR.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR
THE DISTRICT OF COLORADO.

FILED JUNE 20, 1895.

UNITED STATES CIRCUIT COURT OF APPEALS
EIGHTH CIRCUIT.

DECEMBER TERM, 1895.

No. 663.

THE SUN INSURANCE OFFICE OF LONDON, ENGLAND,
PLAINTIFF IN ERROR,

VS.

THE INTERNATIONAL TRUST COMPANY OF DENVER,
COLORADO, DEFENDANT IN ERROR.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR
THE DISTRICT OF COLORADO.

FILED JUNE 20, 1895.

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Pleas and proceedings in the United States Circuit Court of Appeals for the Eighth Circuit, at the December Term, 1895, of said Court, begun and held at the United States Court House in the City of St. Louis, Missouri, on the first Monday, to-wit, the second day of December, A. D. 1895, before the Honorable Henry C. Caldwell, Honorable Walter H. Sanborn and Honorable Amos M. Thayer, Circuit Judges.

Attest: JOHN D. JORDAN,
Clerk U. S. Circuit Court of Appeals,
[SEAL] Eighth Circuit.

Be it Remembered, That heretofore, to-wit, on the twentieth day of June, A. D. 1895, a transcript of record, pursuant to a writ of error directed to the Circuit Court of the United States for the District of Colorado, was filed in the office of the clerk of the United States Circuit Court of Appeals for the Eighth Circuit, in the case of The Sun Insurance Office of London, England, Plaintiff in Error, vs. The International Trust Company of Denver, Colorado, Defendant in Error, which said transcript of record, as printed by stipulation of the parties for the use of said Court on the hearing in this cause, is in the words and figures following, to-wit:

a. United States of America.
Eighth Judicial Circuit—ss.

In the United States Circuit Court of Appeals.

STIPULATION.

The Sun Insurance Office, Plaintiff in Error,
vs.
The International Trust Company, Defendant in Error.

Whereas, the following parts of the record in the above entitled cause are believed by the parties hereto to be the only parts thereof necessary for the consideration of the errors assigned.

Now, therefore, It is hereby stipulated that only such parts of the record as are hereinafter designated shall be printed by the Clerk, and the Clerk is hereby directed to print the same according to the rules of this Court, as follows, to wit:

I.

The Amended complaint, omitting the verification and the endorsement thereof, found at pages 27-35, inclusive, of the record.

II.

Exhibit "B" of the original complaint, found on pages 18-22, inclusive, omitting the endorsement and beginning with the words "In consideration of which," and omitting the three paragraphs on page 19, beginning with the words ["Lightening] clause," "gasoline permit," and "caution," (Do not print Exhibit "A" of the original complaint, as it was never made a part of the amended complaint.)

b III.

Demurrer to amended complaint, found on page 36, and omitting the endorsement.

IV.

Order overruling demurrer, found on page 36, and memorandum of Court on page 38, omitting the endorsement.

V.

Order allowing the defendant time to answer, found on page 40.

VI.

Answer, found on pages 40-72 inclusive,omitting the verification and endorsement.

VII.

Replication, found on page 73-85, omitting the verification and endorsement.

VIII.

Bill of Exceptions, in full down to the Exhibits, found on pages 103-241, inclusive.

IX.

Exhibits and memoranda thereof, as set out in the Bill of Exceptions:

"Memoradum"—on page 242.

Exhibits 1, 2, 3, & 9 on pages 242-244 inclusive.

Exhibit 13, omitting [lightening] clause, gasoline permit and caution clause; it being the policy sued upon.

Exhibit 14, found on page 246.

Exhibits 15 & 16, found on page 247.

For Exhibit 17, found on page 248, print as follows:

"Exhibit 10.—Notice of loss from International Trust
c Company to the Sun Insurance Office, October 12th, 1893.

Exhibit 18, found on pages 249 252. Omit verification, but insert word "verified". (Do not [pring] Exhibits "A" & "B" attached to Exhibit 18, found on pages 253-256.) Print Exhibit "C" of Exhibit 18, found on page 257.

Exhibit 19, found on page 258.

Exhibit 22, found on pages 259-265, omitting the verification, but insert word "verified.

Exhibit 23, found on page 266.

For Exhibits 24 & 25 print as follows: "Exhibits 24 & 25. Affidavits of H. I. VanKuren, Caleb F. Ray, made respectively January 10, 1894, and January 17, 1894."

Letter accompanying Exhibits 24 & 25, found on page 268.
Exhibit 26, found on page 269.
Exhibit 32, found on page 269.
Exhibit 37, found on pages 269-270.
Exhibit 38, found on pages 271-275.
Exhibit 39, found on page 276.
Exhibit 40, found on page 277.
Exhibit 41, found on page 277.
Exhibit 42, found on page 279.
Exhibit 43, found on page 279.
Exhibit 44, found on page 280.
Exhibit 45, found on page 280.
Exhibit 46, found on page 281.
Exhibits "A" & "B," found on pages 282-283.
Formal closing of bill of Exceptions on page 284.

X.

Final judgment found on page 101.
d Assignments of error, found on pages 289-301

MILTON SMITH,
Attorney for Plaintiff in Error.

A. E. PATTISON,
A. C. CAMPBELL,
Attorneys for Defendant in Error.

No. 663. United States of America, Eighth Judicial Circuit—ss. United States Circuit Court of Appeals. The Sun Insurance Office, Plaintiff in Error, vs. The International Trust Co., Defendant in Error. Stipulation. Filed June 20, 1895. John D. Jordan, Clerk. T. J. O'Donnell, W. S. Decker and Milton Smith, Attorneys for Plaintiff in Error.

1 Pleas in the Circuit Court of the United States for the District of Colorado. Sitting at Denver.

* * * * * * *

27 In the Circuit Court of the United States within and for the District of Colorado.

The International Trust Company, Plaintiff,
vs.
Sun Insurance Office, Defendant.

AMENDED COMPLAINT.

Now comes The International Trust Company, plaintiff, as aforesaid, and for cause of action against the Sun Insurance Office defendant, (a fire insurance corporation), alleges as follows, to-wit:

I.

That plaintiff Company is a corporation organized, existing and doing business under and in pursuance of the laws of the State of Colorado, in the City of Denver and State of Colorado, and was such on the 12th day of December, 1892, and ever since up to the present time.

II.

That the defendant, the Sun Insurance Office, is a corporation established and existing under the laws of the Kingdom [or] Great Britian and Ireland and doing business in the United States of America, and especially in the State of Colorado, under and in pursuance of the laws of said State, from the 14th day of December 1892, up to the present time.

28 III.

That the matter in dispute in this action, exclusive of cost and interest, exceeds in value the sum of two thousand dollars.

IV.

That on or about the 14th day of June, 1893, one John R. Gordon, a citizen of the State of Colorado, was, subject to the encumbrance hereinafter set out, the owner of Lots 8, 9, 10, 11, 12, 13, 14, 15 and 16, in Block 126 in the former Town of South Pueblo, now City of Pueblo, State of Colorado, and had been the owner of said lots at all times between the 12th day of December, 1892, and the 14th day of June, 1893; that the said John R. Gordon had theretofore commenced and on June 14th, 1893, had partially completed a hotel building upon said lots, and had expended upon the same a large sum of money, to-wit, over $125,000.

V.

That on the 14th day of June, 1893, the said John R. Gordon was indebted to the plaintiff Company in the sum of $50,000, which said sum of money he had borrowed on December 12th,

1892, and in evidence thereof had executed his certain promissory note, dated December 12th, 1892, for the sum of $50,000 with interest at the rate of 7 per cent per annum to maturity, and 10 per cent per annum after maturity, payable June 12th, 1893, to plaintiff Company or its order. That to secure
29 said note and the payment of the sum of money borrowed as aforesaid, the said Gordon did furthermore, and on, to-wit, December 12th, 1892, execute and deliver his certain deed of trust to Mahlon D. Thatcher, Trustee, upon all of the lots hereinbefore set out, together with all buildings and improvements thereon, or thereafter to be put upon the same, and all and singular the tenements, hereditaments and appurtenances thereunto belonging, with the usual power of sale of said property in case said note and interest were not paid.

VI.

That on the 14th day of June, 1893, said note was wholly unpaid and said deed of trust was in full force and effect; and said note is still due and payable to plaintiff Company, and said deed of trust is still a lien in favor of plaintiff upon said property, nor was said note or any portion thereof paid on the 9th day of October, 1893, the date upon which the buildings upon said lots were destroyed by fire, as hereinafter set out. Plaintiff alleges that on the 14th day of June, 1893, and at all times between said date and the 9th day of October, 1893, it had and possessed a good and insurable interest in the property aforesaid, under and by virtue of the indebtedness of the said John R. Gordon, as aforesaid, and the deed of trust securing the same, to the amount of $50,000 with interest thereon according to the terms of said note.

VII.

Plaintiff furthermore alleges that on, to-wit, the 14th
30 day of June, 1893, defendant Company, having theretofore carried an insurance risk upon the property aforesaid, did, at the special instance and request of plaintiff Company and also at the special instance and request of the said John R. Gordon, execute, issue and deliver to plaintiff Company, by and through its agents thereunto duly authorized, its renewal policy of insurance No. 4475189, under and by which defendant Company did agree to insure and did insure against loss by fire the building situated upon said lots, as set out and described in said policy of insurance, and other property therein set out, in the amount of $5,000, for six months from the 14th day of June, 1893; for greater particularity reference is made to said policy. And defendant Company did furthermore and contemporaneously with the execution of said renewal policy of insurance, attach to the same a mortgagee clause or agree-

ment for the benefit and protection of plaintiff Company and its assigns, making the loss, if any, upon the buildings set out and described in said policy of insurance, payable to plaintiff Company and its assigns, and which said renewal policy of insurance and mortgagee clause thereto attached are fully set out in Exhibit "B" with original complaint which is Exhibit "A" herewith filed and prayed to be taken as a part of this complaint; that after the execution and issuance of said renewal policy of insurance with mortgagee clause attached as aforesaid, the same was in due course of business delivered 31 to and accepted by plaintiff Company subject to the terms and conditions thereof, for the protection of itself and its assigns.

VIII.

Plaintiff furthermore alleges, that said renewal policy of insurance was issued not only in pursuance of an agreement between the said John R. Gordon and defendant Company, but in pursuance of direct negotiations and agreements between plaintiff Company and defendant Company, and defendant Company, at the time the same was issued, understood and agreed that said policy of insurance was for the especial benefit and protection of plaintiff Company and its assigns, and in consideration thereof plaintiff Company did covenant and agree that it would undertake to do and perform the things required of it by and under said mortgagee clause attached to said renewal policy of insurance, and especially, that upon the demand of the defendant Company it would pay any premium which should be unpaid upon said policy.

IX.

Plaintiff furthermore alleges, that afterwards, and on or about the ......day of September, 1893, the said John R. Gordon, not having paid the premium upon the policy of insurance aforesaid, defendant Company did, by and through its agents, make demand upon plaintiff Company, who was then and there the holder, owner and possessor of the note of the said 32 John R. Gordon, and the indebtedness thereby evidenced, for such premium, and thereupon and on, to-wit, the 26th day of September, 1893, plaintiff Company did pay to defendant Company the full amount of the premium due for the insurance, as aforesaid, which said premium defendant Company accepted and appropriated to its own use and benefit, and has ever since retained and held the same,—the premium so paid being fifty-two and 50/100 dollars.

X.

Plaintiff furthermore alleges that on, to-wit, the 9th day of October, 1893, and whilst the agreement of insurance as here-

inbefore set out on the part of defendant Company was in full force and effect for the benefit and protection of plaintiff Company, the property covered by the insurance agreement of defendant Company, including the buildings, foundations and all parts thereof, was almost, if not totally destroyed by fire; that the direct loss and damage were within the terms and provisions of the agreement of insurance of defendant Company, as hereinbefore set out, and the mortgagee clauses or agreements forming a part thereof, and exceeded the sum of $125,000; that at the time of such loss and damage plaintiff Company was the sole owner of the note of John R. Gordon aforesaid, and the indebtedness thereby evidenced, and was alone entitled to the benefit and protection of the mortgagee clause or agreement forming a part of the agreement of insurance by
33 defendant Company, as aforesaid; that thereupon and under and by virtue of the provisions of said agreement of insurance and the mortgagee clause or agreement forming a part thereof, plaintiff Company became entitled to demand and receive of and from defendant Company the sum of $5,000.00 on account of said loss and damage.

XI.

Plaintiff furthermore alleges that immediately after said fire had occurred, plaintiff Company for and on its own behalf and as the beneficiary under the agreement of insurance, as aforesaid, with loss payable to it, proceeded to give notice of said fire and the loss arising therefrom, and of the interests of plaintiff Company, in writing, to defendant Company, and did proceed to do all other acts and things required of it by defendant's policy or agreement of insurance aforesaid; that furthermore, and within the time required by said policy of insurance, and on, to-wit, the 3rd day of November, 1893, plaintiff Company for itself and as the payee of the loss under said policy, did proceed to furnish full and complete proofs in writing, as called for and required by said policy of insurance, of said fire and the loss thereby occasioned, in accordance with the terms and provisions of defendant's agreement of insurance, which said proofs of loss were received and accepted by defendant Company.

XII.

34 Plaintiff furthermore alleges that it hath, both before and since said fire, done all things and performed all acts required of it by defendant Company under its agreement of insurance, as aforesaid, or by the mortgagee clauses or agreements thereto attached and forming a part thereof; and plaintiff furthermore alleges that in addition to the notice and proof furnished by plaintiff Company, the said John R. Gordon did

immediately give notice of said fire to defendant Company, and did then and there and within the time required by defendant's policy of insurance, furnish proofs of loss as required by said policy of insurance, which said notice and proofs of loss were in his own behalf and independent of plaintiff's notice and proofs of loss, subject, however, to plaintiff's rights under said mortgagee clause.

Plaintiff Company furthermore alleges, that it is now the sole owner of the note of the said John R. Gordon and the indebtedness thereby evidenced; that at the time said fire occurred there was other insurance upon said property in addition to the insurance carried by defendant Company, amounting to $40,000; that since said fire $10,000 of such insurance has been paid to plaintiff Company, and has been applied on the indebtedness of said John R. Gordon, leaving at the beginning of this suit $43,965.42 due to plaintiff Company upon the same.

Plaintiff furthermore alleges that it has at all times
35 done all things and performed all acts required of it by the terms of defendant's agreement of insurance and the mortgage clauses and agreements thereto attached, and has performed all covenants and agreements by it undertaken; that it is now and has been at all times since said fire occurred, entitled to demand and receive from defendant Company the sum of $5,000.00 under its agreement of insurance aforesaid; that notwithstanding such fact, and notwithstanding the frequent demands of plaintiff Company upon defendant Company, the said defendant Company hath failed and refused to pay to plaintiff Company the sum of $5,000 aforesaid, or any part thereof, and the same and the whole thereof is now due on account of the direct loss and damage to said building and property by fire, as aforesaid.

Plaintiff furthermore alleges that more than sixty days have elapsed and expired since proofs were furnished by plaintiff Company, and also more than sixty days have expired since proofs were furnished by the said John R. Gordon.

Wherefore, Plaintiff prays judgment against defendant Company for the sum of five thousand (5,000) dollars, with interest thereon from the 9th day of October, 1893, until paid, and for costs of this suit.

PATTISON, EDSALL & HOBSON,
Attorneys for plaintiff.

* * * * * * *

18 In Consideration of the Stipulations Herein Named and of Fifty-two and 50/100 Dollars Premium Does Insure J. R. Gordon, Esq. for the Term of Six months from the 14th day of June 1893, at noon, to the 14th day of December, 1893, at noon, against all direct loss or damage by fire, except as hereinafter provided.

To An Amount Not Exceeding Five Thousand Dollars, to the following described property while located and contained as described herein, and not elsewhere, to-wit:

J. R. Gordon,

$5000.00—For six months. On the six-story and basement stone, brick and iron building, in course of construction, including foundations, plate glass of all sizes, while set in building, frescoed work and gilding on walls and ceilings, heating apparatus, plumbing, sewer, gas and water pipes, radiators, tiling, gas and electric light fixtures, chandeliers and electric light wiring, elevator and elevator apparatus and fixtures and sidewalks around said building; and on all building materials, supplies and machinery contained in and about above premises and in frame carpenter shop adjoining, situate on Lots Nos. 8, 9, 10, 11, 12, 13, 14, 15, 16 in block No. 126 of the former town of South Pueblo, now City of Pueblo, Colorado. To be occupied and known as the "Hotel Mesa."

Other Concurrent insurance permitted.

Lightning clause and gasoline stove permit attached to Policy.

Loss, if any, payable to M. D. Thatcher, trustee for the International Trust Company, of Denver, Colo. as his [inter-] may appear. (Their regular subrogation clause attached to Policy). 19

* * * * * * *

20 Whereas, The property described in this Policy has been conveyed to M. D. Thatcher in trust, to secure the payment of a certain indebtedness to The International Trust Company, Denver, Colorado:

And Whereas, the owner of the Policy has requested that the loss, if any, be made payable to the said Company: Therefore, the loss, if any, is made payable to The International Trust Company, Denver, Colorado, and its assigns.

It Being Hereby Understood and Agreed, That this insurance, as to the interest of the Mortgagee or Trustee only therein, shall not be invalidated by any act or neglect of the Mortgagor or owner of the property insured, nor by the occupation of the premises for purposes more hazardous than are permitted by the terms of this Policy. Provided, that in case the Mortgagor or owner neglects or refuses to pay any premium due under this Policy, then on demand, the Mortgagee or Trustee shall pay the same. Provided, also, that the Mortgagee or Trustee shall notify this Company of any change of ownership or increase of hazard which shall come to his, or their knowledge, and shall have permission for such change of ownership or increase of hazard duly endorsed on this Policy. And Provided Further, that every increase of hazard not permitted by the Policy to the Mortgagor or owner, shall be paid for by the Mortgagee or Trustee on reasonable demand, and after demand made by this Company upon, and refusal by the Mortgagor or owner to pay, according to the established schedule of rates. It is, however, understood that this Company reserves the right to cancel this Policy, as stipulated in the printed conditions of said Policy; and, also, to cancel this agreement on giving ten days' notice of its intention to the Trustee or Mortgagee named therein, and from and after the expiration of the said ten days this agreement shall be null and void. It is Further Agreed that in case of any other insurance upon the property hereby insured, then this Company shall not be liable, under this Policy, for a greater portion of any loss sustained than the sum hereby insured bears to the whole amount of insurance on said property, issued to or held by any party or parties having an insurable interest therein. It is also Agreed that whenever this Company shall pay the Mortgagee or Trustee any sum for loss under this Policy, and shall claim that as to the Mortgagor or owner no liability therefor exists, it shall at once and to the extent of such payment be legally subrogated to all the rights of the party to whom such payment shall be made, under any and all securities held by such party for the payment of said debt. But such subrogation shall be in subordination to the claim of said party for the balance of the debt so secured. Or said Company may, at its option, pay the said Mortgagee or Trustee the whole debt so secured, with all the interest which may have accrued thereon to the date of such payment, and shall thereupon receive from the party to whom such payment shall be made an assignment and transfer of said debt, with all securities held by said parties for the payment thereof.

In testimonythat the foregoing provisions are made a part of Pôlicy No. 4475189, of Sun Ins. Office Insurance Company of

London to which they are attached, witness my hand at Pueblo Colo this 14th day of June, A. D. 1893.

HENRY O. MORRIS, Agent Col.

Accepted and agreed to by

THE INTERNATIONAL TRUST COMPANY.

By HENRY W. HOBSON, Vice Pres.

This Company shall not be liable beyond the actual cash value of the property at the time any loss or damage occurs, and the loss or damage shall be ascertained or estimated according to such actual cash value, with proper deduction for depreciation however caused, and shall in no event exceed what it would then cost the insured to repair or replace the same with material of like kind and quality; said ascertainment or estimate shall be made by the insured and this company, or, if they differ, then by appraisers, as hereinafter provided; and, the amount of loss or damage having been thus determined, the sum for which this Company is liable, pursuant to this policy shall be payable sixty days after due notice, ascertainment, estimate, and satisfactory proof of the loss have been received by this company in accordance with the terms of this
21 policy. It shall be optional, however, with this company to take all, or any part, of the articles at such ascertained or appraised value, and also to repair, rebuild, or replace the property lost or damaged with other of like kind and quality within a reasonable time on giving notice, within thirty days after the receipt of the proof herein required, of its intention so to do; but there can be no abandonment to this Company of the property described.

This entire policy shall be void if the insured has concealed or misrepresented, in writing or otherwise, any material fact or circumstance concerning this insurance or the subject thereof, or if the interest of the insured in the property be not truly stated herein, or in case of any fraud or false swearing by the insured touching any matter relating to this insurance of the subject thereof, whether before or after a loss.

This entire policy, unless otherwise provided by agreement indorsed hereon or added hereto, shall be void if the insured now has or shall hereafter make or procure any other contract of insurance, whether valid or not, on property covered in whole or in part by this policy; or if the subject of insurance be a manufacturing establishment and it be operated in whole or in part at night later than ten o'clock, or if it cease to be operated for more than ten consecutive days; or if the hazard be increased by any means within the control or knowledge of the insured; or if mechanics be employed in building, altering, or repairing the within described premises for more than fifteen days at any one time; or if the interest of the insured be other than unconditional and sole ownership; or if the subject of insurance be a building on ground not owned by the insured in fee-simple; or if the subject of insurance be personal property and be or become incumbered by a chattel mortgage; or if, with the knowledge of the insured, foreclosure proceedings be commenced or notice given of sale of any property covered by this policy by virtue of any mortgage or trust deed; or if any change, other than by the death of an insured, take place in the interest, title, or possession of the subject of insurance (except change of occupants without increase of hazard) whether by legal process or judgment or by voluntary act of the insured, or otherwise; or if this policy be assigned before a loss, or if illuminating gas or vapor be generated in the described building (or adjacent thereto) for use therein; or if (any usage or custom of trade or manufacture to the contrary notwithstanding) there be kept, used, or allowed on the above described premises, benzine, benzole, dynamite, ether, fireworks, gasolene, greek fire, gunpowder exceeding twenty-five pounds in quantity, naphtha, nitro-glycerine or other explosives, phosphorus, or petroleum or any of its products of greater inflammability than kerosene oil of the United States standard, (which last may be used for lights and kept for sale according to law but in quantities not exceeding five barrels, provided it be drawn and lamps filled by daylight or at a distance not less than ten feet from artificial light); or if a building herein described, whether intended for occupancy by owner or tenant, be or become vacant or unoccupied and so remain for ten days.

This company shall not be liable for loss caused directly or indirectly by invasion, insurrection, riot, civil war or commotion, or military or usurped power, or by order of any civil authority; or by theft; or by neglect of the insured to use all reasonable means to save and preserve the property at and after a fire or when the property is endangered by fire in neighboring premises; or (unless fire ensues, and, in that event, for the damage by fire only) by explosion of any kind, or lightning; but liability for direct damage by lightning may be assumed by specific agreement hereon.

If a building or any part thereof fall, except as the result of fire, all insurance by this policy on such building or its contents shall immediately cease.

This company shall not be liable for loss to accounts, bills, currency, deeds, evidences of debt, money, notes, or securities; nor, unless liability is specifically assumed hereon, for loss to awnings, bullion, casts, curiosities, drawings, dies, implements, jewels, manuscripts, medals, models, patterns, pictures, scientific apparatus, signs, store or office furniture or fixtures, sculpture, tools, or property held on storage or for repairs; nor, beyond the actual value destroyed by fire, for loss occasioned by ordinance or law regulating construction or repair of buildings, or by interruption of business, manufacturing processes, or otherwise; nor for any greater proportion of the value of plate glass, frescoes, and decorations than that which this policy shall bear to the whole insurance on the building described.

If an application, survey, plan, or description of property be referred to in this policy it shall be a part of this contract and a warranty by the insured.

In any matter relating to this insurance no person, unless duly authorized in writing, shall be deemed the agent of this Company.

This policy may by a renewal be continued under the original stipulations, in consideration of premium for the renewed term, provided that any increase of hazard must be made known to this company at the time of renewal or this policy shall be void.

This policy shall be canceled at any time at the request of the insured; or by the company by giving five days notice of such cancellation. If this policy shall be canceled as hereinbefore provided, or become void or cease, the premium having been actually paid, the unearned portion shall be returned on surrender of this policy or last renewal, this company retaining the customary short rate; except that when this policy is canceled by this company by giving notice it shall retain only the pro rata premium.

If, with the consent of this company, an interest under this policy shall exist in favor of a mortgagee or of any person or corporation having an interest in the subject of insurance other than the interest of the insured as described herein, the conditions hereinbefore contained shall apply in the manner expressed in such provisions and conditions of insurance relating to such interest as shall be written upon, attached, or appended hereto.

If property covered by this policy is so endangered by fire as to require removal to a place of safety, and is so removed, that part of this policy in excess of its proportion of any loss and of the value of property remaining in the original location, shall, for the ensuing five days only, cover the property so removed in the new location; if removed to more than one location, such excess of this policy shall cover therein for such five days in the proportion that the value in any one such new location bears to the value in all such new locations; but this company shall not, in any case of removal, whether to one or more locations, be liable beyond the proportion that the amount hereby insured shall bear to the total insurance on the whole property at the time of fire, whether the same cover in new location or not.

If fire occur the insured shall give immediate notice of any loss thereby in writing to this company, protect the property from further damage, forthwith separate the damaged and undamaged personal property, put it in the best possible order, make a complete inventory of the same, stating the quantity and cost of each article and the amount claimed thereon; and, within sixty days after the fire, unless such time is extended in writing by this company, shall render a statement to this company, signed and sworn to by said insured, stating the knowledge and belief of the insured as to the time and origin of the fire; the interest of the insured and of all others in the property; the cash value of each item thereof and the amount of loss thereon; all incumbrances thereon; all other insurance, whether valid or not, covering any of said property; and a copy of all the descriptions and schedules in all policies; any changes in the title, use, occupation, location, possession, or exposures of said property since the issuing of this policy, by whom and for what purpose any building herein described and the several parts thereof were occupied at the time of fire; and shall furnish, if required, verified plans and specifications of any building, fixtures, or machinery destroyed or damaged; and shall also, if required, furnish a certificate of the magistrate or notary public (not interested in the claim as a creditor or otherwise, nor related to the insured) living nearest the place of fire, stating that he has examined the circumstances and believes the insured has honestly sustained loss to the amount that such magistrate or notary public shall certify.

The insured, as often as required, shall exhibit to any person designated by this company all that remains of any property herein described, and submit to examinations under oath by any person named by this company, and subscribe the same; and, as often as required, shall produce for examination all books of account, bills, invoices, and other vouchers, or certified copies thereof if originals be lost, at such reasonable place as may be designated by this company, or its representative, and shall permit extracts and copies thereof to be made.

In the event of disagreement as to the amount of loss, the same shall, as above provided, be ascertained by two competent and disinterested appraisers, the insured and this company each selecting one, and the two so chosen shall first select a competent and disinterested umpire; the appraisers together shall then estimate and appraise the loss, stating separately sound value and damage, and, failing to agree, shall submit their differences to the umpire; and the award in writing of any two shall determine the amount of such loss; the parties thereto shall pay the appraiser respectively selected by them and shall bear equally the expenses of the appraisal and umpire.

This company shall not be held to have waived any provision or condition of this policy or any forfeiture thereof by any requirement, act, or proceeding on its part relating to the appraisal or to any examination herein provided for; and the loss shall not become payable until sixty days after the notice, ascertainment, estimate, and satisfactory proof of the loss herein required have been received by this company, including an award by appraisers when appraisal has been required.

22 This company shall not be liable under this policy for a greater proportion of any loss on the described property, or for loss by and expense of removal from premises endangered by fire, than the amount hereby insured shall bear to the whole insurance, whether valid or not, or by solvent or insolvent insurers, covering such property, and the extent of the application of the insurance under this policy or of the contribution to be made by this company in case of loss, may be provided for by agreement or condition written hereon or attached or appended hereto. Liability for re-insurance shall be as specifically agreed hereon.

If this company shall claim that the fire was caused by the act or neglect of any person or corporation, private or municipal, this company shall, on payment of the loss, be subrogated to the extent of such payment to all right of recovery by the insured for the loss resulting therefrom, and such right shall be assigned to this company by the insured on receiving such payment.

No suit or action on this policy, for the recovery of any claim, shall be sustainable in any court of law or equity until after full compliance by the insured with all the foregoing requirements, nor unless commenced within twelve months next after the fire.

Wherever in this policy the word "insured" occurs, it shall be held to include the legal representative of the insured, and wherever the word "loss" occurs, it shall be deemed the equivalent of "loss or damage."

If this policy be made by a mutual or other company having special regulations lawfully applicable to its organization, membership, policies or contracts of insurance, such regulations shall apply to and form a part of this policy as the same may be written or printed upon, attached, or appended hereto.

This policy is made and accepted subject to the foregoing stipulations and conditions, together with such other provisions, agreements, or conditions as may be indorsed hereon or added hereto, and no officer, agent, or other representative of this company shall have power to waive any provision or condition of this policy except such as by the terms of this policy may be the subject of agreement indorsed hereon or added hereto, and as to such provisions and conditions no officer, agent, or representative shall have such power or be deemed or held to have waived such provisions or conditions unless such waiver, if any, shall be written upon or attached hereto, nor shall any privilege or permission affecting the insurance under this policy exist or be claimed by the insured unless so written or attached.

In witness whereof, this company has executed and attested these presents this 14th day of June, 1893.

J. J. GUILE.

Manager of the United States Branch of the Sun Insurance Office.

This policy shall not be valid unless countersigned by the duly authorized manager or agent of the Company at Pueblo, Colorado.

Countersigned by Henry O. Morris.

* * * * * * *

36 In the Circuit Court of the United States within and for the District of Colorado.

The International Trust Company, Plaintiff,

vs.

Sun Insurance Office, Defendant.

DEMURRER.

Now comes the said defendant the Sun Insurance Office, and for demurrer to the amended complaint, filed by the plaintiff in the above entitled cause, says,

That the said complaint does not state facts sufficient to constitute a cause of action.

BROWN & SMITH,

Attorneys for Defendant.

* * * * * * *

37 46th Day, November Term

Wednesday January 2d A. D. 1895.

Present: The Honorable Moses Hallett, District Judge, and The Honorable John A. Riner, District Judge of the District of Wyoming, assigned to the District of Colorado, and other officers as noted on the 6th day of November last past.

And before the Honorable John A. Riner, District Judge, the following proceedings are held.

MONEY DEMAND.

The International Trust Company
3061 vs.
Sun Insurance Office.

The demurrer of the defendant to the amended complaint herein and the motion to strike out the Eighth paragraph of said amended complaint having heretofore come on to be heard and having been argued by counsel: H. W. Hobson, Esq., appearing for the plaintiff and Milton Smith, Esq., appearing for the defendant, and the matters having been taken under advisement by the Court, and the Court being now sufficiently advised in the premises, it seemeth to the Court now here that the said amended complaint is sufficient in law. Wherefore it is ordered by the Court that the demurrer to the amended complaint be and the same is hereby overruled. And it is further ordered by the Court that the motion to strike out the Eighth paragraph of said amended complaint be and the same is hereby overruled.

38 Trust Company
vs. Colorado.
Sun Insurance Company.

MEMORANDUM.

This case is before the Court upon a demurrer to the amended petition. The action is upon a contract of insurance. The amended petition specifically alleges that by an agreement entered into between the plaintiff and defendant at the time the renewal policy was issued the plaintiff agreed to perform all things required of it by the mortgage clause attached to the policy and especially that it agreed that it would upon demand pay the unpaid premiums. It is further alleged that pursuant to this agreement it did pay the premium amounting to fifty two dollars and fifty cents which was accepted by the defendant. By the mortgage clause the loss is made payable directly

to the plaintiff. The allegations of the amended petition brings this case clearly within the principle announce- by the Supreme Court of Kansas in the case of Insurance Company vs Cloverdale, 48 Kan. 446. That was a case brought by the insured upon a policy of insurance containing a mortgage clause similar to the one here and it was held that he could not maintain the action for the reason that by the express language of the mortgage clause, attached to the policy, the loss was payable directly to the mortgagee hence he was not the payee and
in order to entitle him to recover he would have to al-
39 lege either the payment of the mortgage or that the
rights of the mortgagee had been transferred to him.

Horton, Chief Justice, after citing the cases where the loss is made payable to a third person who has no interest in the property insured but only claims the insurance as collateral security for liabilities incurred prior to the insurance, says: "The rule laid down in the authorities cited have no application however to a case where a provision has been inserted in the policy which places the mortgagee upon another and different footing from that of a mere assignee or appointee to receive the loss. The mortgage clause was agreed upon for this very purpose, and created an independent and a new contract which removes the mortgagee beyond the control or the effect of any act or neglect of the owner of the property and renders such mortgagees parties who have a direct interest separate from the owner embraced in another and different contract. The tendency of the recent cases is to recognize these distinctions and thus protect the rights of the mortgagee when named in the policy and the interest of the owner and of the mortgagee are regarded as distinct subjects of insurance."

The demurrer to the amended complaint will be overruled.

The motion to strike out the eighth paragraph of the petition comes too late after demurrer filed and will be denied.

* * * * * * *

40 47th Day, Thursday January 3d A. D. 1895.

Present: The Honorable Moses Hallett, District Judge, and the Honorable John A. Riner, District Judge of the District of Wyoming, assigned to the District of Colorado, and other officers as noted on the 6th day of November last past.

And before the Honorable John A. Riner, District Judge, the following proceedings were had.

MONEY DEMAND.

The International Trust Company
3061 vs.
Sun Insurance Office.

At this day comes the defendant by Milton Smith Esq., its attorney and thereupon on its motion it is ordered, that the defendant have leave to file an answer to the complaint and amended complaint herein as it shall be advised within ten (10) days from this day.

In the Circuit Court of the United States within and for the District of Colorado.

ANSWER.

The International Trust Company, Plaintiff,
vs.
The Sun Insurance Office, Defendant.

Now comes the defendant The Sun Insurance Office, by Brown & Smith, its attorneys, and for answer to the complaint of the plaintiff company, makes the following denials and admissions, to-wit:

41 The defendant company admits the truth of the allegations alleged in the first three paragraphs of plaintiff's amended complaint, relating to the incorporation, residence, citizenship, and place of doing business of the plaintiff and defendant companies, and as to the amount involved in this controversy;

That as to whether on or about the 14th day of June, 1893 or at any time, John R. Gordon was the owner of lots 8 to 16 inclusive in Block 126, in the former town of South Pueblo, now the City of Pueblo, and State of Colorado, subject to certain incumbrances or otherwise, and as to whether said Gordon had been the owner of the said lots as aforesaid, at all times between the 12th of December 1892 and the 14th day of June, 1893 or at any time, this defendant has not and cannot obtain sufficient knowledge or information upon which to base a belief, and therefore denies that the said Gordon was at any time mentioned in said complaint the owner of said lots;

Defendant says that it is true that Gordon had, on the 14th day of June, 1893, partially completed a hotel building upon said lots; that as to whether the said Gordon had expended in partial erection of said hotel building the sum of $125,000 or any sum this defendant has not and cannot obtain sufficient knowledge or information upon which to base a belief, and therefore denies that the said Gordon had expended the sum of $125,000 or any sum upon the said building.

42 That as to whether or not on the 14th day of June, 1893, or at any time, the said Gordon was indebted to the plaintiff company in the sum of $50,000 or in any other sum, and as to whether said Gordon on the 12th day of December, 1892, or at any time had borrowed the said sum of $50,000, or any other sum, and as to whether the said Gordon had executed his promissory note therefor in evidence of said indebtedness or otherwise, and as to what were the terms of said alleged promissory note, if one was executed, and as to whether the said Gordon did on or about the 12th day of December A. D. 1892 or at any time, for the purpose of securing the said note and the payment of the sum so alleged to be borrowed or for any purpose execute and deliver his deed of trust to Mahlon D. Thatcher, Trustee, or to any trustee upon the lots described, or any lots, together with the buildings and improvements thereon, or otherwise, and as to what powers of sale were contained in said pretended trust deed and what were its terms, this defendant has not and cannot obtain sufficient knowledge or information upon which to base a belief, and therefore denies all of the allegations in the said fifth paragraph of plaintiff's amended complaint. That as to whether on the 14th day of June, 1893, or at any time said note was wholly unpaid, and as to whether said deed of trust was in full force and effect or otherwise, and as to whether said note is still due and payable to plaintiff company, and as to whether said deed of
43 trust is still a lien in favor of the plaintiff upon said
property, or any property; and as to whether said note or any portion thereof was paid on the 9th day of October A. D. 1893, or at any time; and as to whether on the 14th day of June 1393, or the 9th day of October A. D. 1893, or at any time between said dates, or at any other time, the plaintiff company had or possessed a good and insurable interest in the said property under and by virtue of the alleged indebtedness of the said Gordon or the alleged deed of trust or otherwise, to the amount of fifty thousand dollars ($50,000) or any sum, this defendant has not and cannot obtain sufficient knowledge or information upon which to base a belief and therefore denies all the allegations in the sixth paragraph of said amended complaint contained.

Defendant denies that on the 14th day of June 1893, defendant did execute, issue, or deliver to the plaintiff company either at the special instance and request of plaintiff company, or at the special instance and request of John R. Gordon or otherwise, by and through its duly authorized agents or by any agents or otherwise its renewal policy of insurance Number

4475189, or any renewal policy of insurance, or any policy of insurance, as alleged in the 7th paragraph of said complaint,

And the said defendant company further denies that it did agree to insure or did insure by reason of the said pretended policy of insurance alleged to have been issued the
44 building situated upon the said lots against loss by fire
or otherwise in the amount of five thousand dollars or any sum, for the period of six months or any other period from the 14th day of June 1893 or any other date; and the defendant company denies that it did, contemporaneously with the execution of the said alleged policy or at any time, attach to said alleged policy a mortgage clause or agreement for the benefit and protection of plaintiff company, and its assigns making the loss, if any, upon the building, set out and described in said alleged policy of insurance, payable to plaintiff company and its assigns, as alleged in the said 7th paragraph of said plaintiff's amended complaint or in any manner.

That as to whether after the alleged execution and issuance of said renewal policy of insurance with mortgagee clause attached the same was, in the due course of business or otherwise delivered to and accepted by plaintiff company, subject to terms and conditions thereof, or otherwise, for the protection [or] itself and its assigns or otherwise, this defendant has not and cannot obtain sufficient knowledge or information upon which to base a belief, and therefore denies the same. Said defendant company therefore denies each and every allegation in said 7th paragraph of said amended complaint contained as thereunder in manner and form alleged; and says that the truth and fact in regard to the things and matters contained
45 in said seventh paragraph of said amended complaint
are as follows, to-wit:

That on to-wit, the 14th day of June 1893, at the instance and request of said Gordon, the local agent of the defendant company at Pueblo, Colorado, countersigned a policy of insurance numbered 4475789 of the description mentioned in the plaintiff's complaint, which said policy was executed, issued, and delivered to the said Gordon upon a supposed interest of the said Gordon in and to the property described as in said policy particularly set out and as therein limited and to take effect according to the terms and conditions of the said policy with mortgagee clause attached as therein set forth and not otherwise; the defendant company is informed and believes that the policy and mortgagee clause mentioned in plaintiff's complaint as Exhibit A is a copy of the policy and mortgagee clause so issued by the local agent at Pueblo but the defendant company has not seen the said policy or mortgagee clause, and therefore calls upon the plaintiff company to produce the original policy and mortgagee clause at the trial hereof, and demands proof of the issuance of said policy and mortgagee clause.

Defendant denies that it ever issued a renewal of the policy of insurance to said John R. Gordon with the mortgagee clause attached in favor of plaintiff company, or otherwise, and denies that the alleged renewal policy of insurance was issued either in pursuance of an agreement between said Gordon and 46 defendant company or in pursuance of negotiations and agreements between plaintiff company and defendant company, or in pursuance of negotiations with both Gordon and the plaintiff company or otherwise;

Defendant denies that at the time said renewal policy was issued or at any time the defendant company understood or agreed that said policy of insurance was for the special benefit and protection of plaintiff company and its assigns or either of them, and denies that in consideration thereof plaintiff company covenanted or agreed that it would undertake to do or perform the things required of it by and under said mortgagee clause attached to said renewal policy of insurance; and denies that the said plaintiff company made any covenants in regard thereto or otherwise; [anf] denies that plaintiff covenanted that upon the demand of the defendant company it would pay any premium which should be unpaid upon said policy or otherwise.

Defendant company admits that some time during the month of September, A. D. 1893, the local agent of the defendant company made demand upon the plaintiff company for the premium upon said alleged policy, and that thereafter, and on to-wit, about the 26th day of September 1893, the plaintiff company paid the full amount of the premium due for the said alleged policy; but defendant alleges that the said demand was made at the request of the said John R. Gordon and the said 47 payment was made by the plaintiff company for and on behalf of the said John R. Gordon and under and by virtue of an arrangement and agreement, as defendant is informed and believes, and so upon information alleges and says, made by and between the said Gordon and the said plaintiff company whereby the said Gordon promised and agreed to pay the said plaintiff company for the advance so to be made by it of the said premium as aforesaid;

Defendant denies that it has appropriated the said premium to its own use and benefit and that it has ever since retained and held the same, and on the contrary alleges that it has duly tendered to the plaintiff company the full amount thereof, and the tender was refused by the plaintiff company, as will be more fully hereinafter set forth; Defendant admits that at the time the said premium was paid it accepted the same for the time being, but alleges that it was in ignorance of the fact that the said plaintiff company had no insurable interest in or to the said property, as will more fully hereinafter appear, and further alleges that upon being acquainted with the facts in relation thereto, defendant company at once tendered the said premium so paid by the plaintiff company to defendant company as aforesaid;

48 Defendant admits that on the 9th day of October A. D. 1893 the property including the buildings and foundations was almost totally destroyed by fire; but denies that the loss occasioned by the said fire exceeded the sum of $125,000, and alleges that the defendant company does not know what the amount of said loss was, or whether it amounted to the sum of the insurance thereon, or whether there was any loss to the plaintiff company, and therefore calls upon the plaintiff company to make strict proof of the amount thereof; and denies that the loss and damage were within the terms or provisions of the alleged insurance, or mortgagee clause or agreements forming a part thereof.

That as to whether at the time of the alleged loss the plaintiff company was the sole owner of the said note of John R. Gordon or of the alleged indebtedness evidenced thereby, this defendant has not and cannot obtain sufficient knowledge or information upon which to base a belief, and therefore denies the same, and further denies that the plaintiff company was entitled or is now entitled to any benefit or protection by virtue of the said mortgagee clause forming a part of said alleged policy; and denies that under and by virtue of the provisions of the said policy or mortgagee clause or otherwise or at all, the plaintiff became entitled to demand or receive of and from the defendant company the sum of five thousand dollars or any sum on account of said loss and damage or otherwise;

49 Defendant admits that the plaintiff company gave it notice of the said fire and said pretended loss, and of the alleged interest of plaintiff company, but denies that the plaintiff company has done or performed the acts or things required of it by the said alleged policy of insurance or alleged mortgagee clause attached thereto, and admits that the plaintiff company furnished to the defendant what purported to be a "proof of loss" claimed by the said plaintiff company to have been sustained by it under the policy and mortgagee clause; but denies that plaintiff company did furnish full or complete proofs of loss as called for by said poiicy within the time required by said policy, or at any time, and denies that the said alleged proofs of loss were accepted by the defendant com-

pany, but alleges that they were rejected as will be more fully hereinafter set forth.

Defendant denies that plaintiff company has done or performed the acts required of it by the said policy of insurance or the mortgagee clause or agreements thereto attached; admits that the said John R. Gordon gave notice of said fire, and furnished a statement which purported to be a "proof of loss" alleged to have been sustained by the said Gordon, but denies that the said pretended proof of loss was such a one as was required by the said policy, and denies that the said notice
and the alleged proof of loss were made and given by
50 the said Gordon in his own behalf independently of
plaintiff's notice, and alleged proof of loss, and denies that the said notice and alleged proof of loss of the said Gordon was subject to plaintiff's pretended rights under said pretended mortgagee clause.

That as to whether the plaintiff company is now the sole owner of the said alleged note of the said John R. Gordon or the alleged indebtedness evidenced thereby, and as to the amount of other insurance if any there was upon the said property, and as to what amount of said insurance, if any there was, had been paid and as to the amount which at the beginning of this action was due to the plaintiff company from the said Gordon upon the said alleged indebtedness, this defendant has not and cannot obtain sufficient knowledge or information upon which to base a belief, and therefore denies the allegation of the complaint relating thereto.

Defendant denies that the plaintiff has done or performed the things or acts required of it by the terms of said policy, of insurance or the mortgagee clause or agreements thereto attached and denies that it has performed the covenants or agreements by it alleged to have been undertaken; denies that it now is or has been at all times since the fire occurred or at any time was entitled to demand or receive from defendant company the sum of five thousand dollars or any sum under the said policy of insurance or mortgagee clause as aforesaid or otherwise.

Defendant denies that more than 60 days have elapsed
51 or expired between the time when the said pretended
proof of loss was furnished and the beginning of this action, and denies that more than 60 days have expired between the time when the said John R. Gordon furnished his said pretended proof of loss and the beginning of this action; and alleges that this action was brought within a period much less than 60 days after the furnishing of said pretended proofs of loss by plaintiff company or Gordon, and alleges that neither

the said plaintiff company nor Gordon have furnished full and complete proofs of loss as required by the terms and provisions of said policy, or proof satisfactory to defendant.

For a second and further answer and defense the said defendant company alleges that the said policy of insurance mentioned in said complaint provides that loss, if any, is payable to M. D. Thatcher, trustee, for The International Trust Company, as his interest may appear; that whether this provision is written in the body of the policy, or whether it is typewritten on a separate piece of paper, and attached to the policy, or whether it is written by hand on a separate piece of paper and attached to the policy, this defendant has no knowledge, but alleges that it is either the one or the other, and calls upon the plaintiff company to produce the original policy at the trial of this cause, so that reference thereto may be had. That the said M. D. Thatcher, trustee, as aforesaid, has entirely failed and neglected either to give notice of any kind of said fire, or to furnish a statement or proof of loss of any kind;
52 neither has he brought suit against this defendant company. That by reason of the premises the proper person to sue upon said policy is said M. D. Thatcher, trustee, and that therefore the suit of the plaintiff company is improperly brought.

And for a further and third answer and defense, the said defendant alleges that the said policy provides that:

"This company shall not be liable beyond the actual cash value of the property at the time any loss or damage occurs, and the loss or damage shall be ascertained or estimated according to such cash value, * * * said ascertainment or estimate shall be made by the insured and this company, or, if they differ, then by appraisers, as hereinafter provided; and, the amount of loss or damage having been thus determined, the sum for which this company is liable pursuant to this policy shall be payable sixty days after due notice, ascertainment, estimate, and satisfactory proof of the loss have been received by this company in accordance with the terms of this policy."

Said policy further provides that:

"If fire occur the insured shall give immediate notice of any loss thereby in writing to this company, protect the property from further damage, forthwith separate the damaged and undamaged personal property, put it in the best possible order, make a complete inventory of the same, stating the quantity, and cost of each article, and the amount claimed thereon; and, within sixty days after the fire, unless such time is extended

in writing by this company, shall render a statement to this company, signed and sworn to by said insured, stating the knowledge and belief of the insured as to the time and origin of the fire; the interest of the insured and of all others in the property; the cash value of each item thereof and the amount of loss thereon; all incumbrances thereon; all other insurance,
whether valid or not, covering any of said property;
53 and a copy of all the descriptions and schedules in all
policies; any changes in the title, use, occupation, location, possession, or exposures of said property since the issuing of this policy; by whom and for what purpose any building herein described and the several parts thereof were occupied at the time of fire."

The said policy also provides:

"In the event of disagreement as to the amount of loss the same shall, as above provided, be ascertained by two competent and disinterested appraisers, the insured and this company each selecting one, and the two so chosen shall first select a competent and disinterested umpire; the appraisers together shall then estimate and appraise the loss, stating separately sound value and damage, and, failing to agree, shall submit their differences to the umpire, and the award in writing of any two shall determine the amount of such loss; the parties thereto shall pay the appraiser respectively selected by them, and shall bear equally the expenses of the appraisal and umpire."

"This company shall not be held to have waived any provision or condition of this policy or any forfeiture thereof by any requirement, act, or proceeding on its part relating to the appraisal or to any examination herein provided for, and the loss shall not become payable until sixty days after the notice, ascertainment, estimate, and satisfactory proof of the loss herein required have been received by this company, including an award by appraisers when appraisal has been required."

The said policy also provides:

"No suit or action on this policy, for the recovery of any claim, shall be sustainable in any court of law or equity until after full compliance by the insured with all the foregoing requirements, nor unless commenced within twelve months next after the fire."

The said policy also provides as follows:

54 "If with the consent of this Company an interest under
this policy shall exist in favor of a mortgagee or of any person or corporation having an interest in the subject of insurance,

other than the interests of the insured, as described herein, the conditions hereinbefore contained shall apply in the manner expressed in such provisions and conditions of insurance relating to such interest as shall be written upon, attached or appended hereto."

Defendant further alleges that there was attached to said policy before its delivery and contemporaneously with its issue, a mortgagee clause whereby loss, if any under this policy, was made payable to the International Trust Company, as will more fully appear by said mortgagee clause set out in the complaint herein. That said mortgagee clause contains no provision or provisions varying the terms or conditions of said policy as to the mode or method of ascertaining the amount of loss in case of fire, or the manner of choosing appraisers, where appraisers are required, or of the giving of the notice of fire or furnishing proofs of loss. That the plaintiff and defendant differed and disagreed as to the amount of loss or damage occasioned by the fire mentioned in plaintiff's complaint, and the defendant company notified the plaintiff-company that the estimate of the amount of loss which the plaintiff company had made was neither satisfactory nor correct and that the defendant company would insist upon a compliance with the terms and provisions of the policy in relation to said ascertainment and estimate of the loss.

55 Defendant alleges that there has been no appointment of appraisers to determine the amount of the said loss, nor has the plaintiff company offered to appoint an appraiser or to submit to an appraisement, nor requested the defendant to appoint an appraiser or to ascertain the amount of loss sustained by plaintiff company, as required by the terms of said policy. That by reason of the premises, the foregoing requirements of the policy have not been fully or otherwise complied with, and the plaintiff company is not entitled to sue upon the said policy, and has waived all rights thereunder.

Defendant further alleges that soon after the alleged fire, to-wit: about the third day of November, 1893, the plaintiff Company and the said John R. Gordon proceeded to make and present pretended statements and proofs of loss, which were materially defective and erroneous. That in both said proofs of loss the makers thereof offered to furnish other information in the following words: "Any other information that may be required will be furnished on call and considered a portion of these proofs." That on the fifth day of January, A. D., 1894, defendant Company notified plaintiff Company that proofs were unsatisfactory, and called for specific information and a more complete proof of loss. That thereafter and on the 12th

day of January, A. D., 1894, the plaintiff Company furnished an additional statement or proof of loss, answering in part the inquiries made by the defendant Company, at the time
56 of its rejection of the proofs of loss on the fifth of January; that plaintiff Company found that its proofs [or] loss, as originally furnished on the third day of November, 1893, and the additional statement or proofs of loss so furnished on the 12th day of November, A. D., 1893, were still materially defective and erroneous and thereupon and on, to-wit: the 16th day of January, A. D., 1894, revoked and recalled its original proofs of loss and corrected and amended the same by furnishing an additional statement thereof; and defendant says that before the sixty days from the furnishing of the said additional or amended proofs of loss, plaintiff Company brought suit upon its policy; and that said plaintiff Company have neither furnished before or after the bringing of said suit or at any time, satisfactory proofs of loss as provided by said policy and the said defendant Company have never accepted the original proofs of loss or the amendments thereto.

Defendant further alleges that neither the plaintiff Company nor Thatcher, as trustee, nor Gordon, have fully or otherwise complied with the requirements of said policy, and that they have failed to furnish satisfactory proof of loss to the defendant Company, and that no appraisement or the amount of loss or the amount of sound value has been had, although the parties hereto differed and disagreed as to the amount of said loss, by reason of all of which the plaintiff Company has waived its rights to recover upon said policy and mortgagee clause
57 or either of them.

Defendant further says that the amended and additional proof of loss were not furnished sixty days prior to the bringing of this suit; that by reason thereof the loss or damage, if any, sustained by the plaintiff Company has not become due or payable.

Defendant for a further and third answer and defence alleges and says: That said policy number 4475189 of defendant Company issued to the said John R. Gordon, was issued, delivered and accepted subject to the terms, conditions, statements, stipulations and warranties contained therein, and according to the true intent and meaning thereof; that the said policy purported to insure only the interest of John R. Gordon in the said property as the unconditional and sole owner thereof, and only to the extent and amount and nature of the interest of said Gordon, as is set forth, limited and described by the terms of said policy. By the terms and provisions of said policy it was expressly agreed that the interest so agreed upon to be insured was as follows, to-wit:

"This entire policy shall be void if the insured has concealed or misrepresented in writing or otherwise any material fact or circumstance concerning this insurance or the subject thereof; or if the interest of the insured in the property be not truly stated herein; or in case of any fraud or false swearing by the insured touching any matter relating to this insurance or the subject thereof, whether before or after loss."

And the policy further provides as follows:

58 "This entire policy, unless otherwise provided by agreement endorsed hereon or added hereto, shall be void * * * if the interests of the insured be other than unconditional and sole ownership; of if the subject of the insurance be a building on ground not owned by the insured in fee simple."

The defendant Company alleges that at the time the said policy was made, executed and delivered, to-wit: the 14th day of June, 1893, the said John R. Gordon was not an unconditional and sole owner of the said property; and the ground upon which the said building was erected was not owned by the said Gordon in fee simple; and the interest of the said Gordon in said property was not truly stated to the said Company or incorporated in said policy. But on the contrary the said Gordon did on the 12th day of June, 1893, by his deed of trust, acknowledge on the said 12th day of June, A. D., 1893, and recorded on the same day, in the records of the County Clerk and Recorder of Pueblo County, in Book 152, at page 57, convey to Thomas J. Downen, Trustee, lots six (6) to ten (10) inclusive, in Block 126 South Pueblo, now a part of the City of Pueblo, Pueblo County, Colorado, to secure his note of the same date payable to the order of J. S. Reiland, six months after date thereof, for five thousand dollars with interest thereon at eight per cent per annum, which is a part and parcel of the premises described in the plaintiff's complaint upon which the said Mesa Hotel building was being constructed.

Defendant further answering says: That having agreed to insure the interest, as aforesaid, of the said Gordon 59 against loss as might be occasioned by fire in the property described, it further, by the mortgagee clause and agreement attached to the said policy (which was so attached for the benefit and convenience of the said Gordon, and at the sole instance and request of the said Gordon for that purpose, as defendant is informed and believes, and so alleges) for the purpose of enabling the said Gordon to secure certain indebtedness then and for a long time prior thereto owing by the said Gordon to the plaintiff corporation, did agree that, if any loss should be sustained under this policy, that the interest of the said Gordon, as aforesaid, sought to be insured, as aforesaid, such loss should be payable to the plaintiff corporation, the International Trust Company, as more particularly set out in said mortgagee clause, But, as defendant is by counsel advised and because of the conveyances made by the said Gordon, aforesaid, the said Gordon was not the sole and unconditional owner of said property nor the ground upon which the building was erected by the said Gordon was not owned in fee simple, and the said Gordon had no interest therein, as required by said policy. as aforesaid, and by reason of the misrepresentations of the said Gordon and the said plaintiff Company as to the said interest of the said Gordon, but that the said policy and the mortgagee clause were at all times void, and of no force and effect.

60 And defendant further says that the said John R. Gordon and the said plaintiff Company, and the said M. D. Thatcher, as Trustee, each and all, failed to notify this defendant Company that by the said trust deeds, hereinbefore described, the said Gordon had conveyed said property to Thos. Downen, Trustee, and concealed and misrepresented the interest of the said Gordon therein, and represented his title to be in fee simple, subject to the trust deed of Thatcher.

And defendant further alleges that the interest of the said Gordon was not truly stated in the said policy, and that it contains no statement relating to the said trust deeds thereupon.

Defendant further says that the said policy of insurance provides as follows:

This policy shall be canceled at any time by request of the insured or by the Company by giving five days notice of such cancellation. If this policy shall be canceled, as hereinbefore provided or become void or cease the premium having been actually paid, the unearned portion shall be returned on surrender of this policy or last renewal, this Company retaining the customary short rate, except that when this policy is canceled by this Company by giving notice, it shall retain only the pro-rata premium."

Defendant further says that when it was informed of the facts aforesaid, and that said policy and mortgagee clause was absolutely void and that no liability existed under or by virtue of the said policy or mortgagee clause, it offered to re-
61 turn and tendered to the plaintiff corporation the premium advanced, for the use and benefit of said Gordon and at his request, the interest thereon, and all costs accrued up to the date of the tender thereof being the amount of seventy-two

and 21/100 dollars. But plaintiff Company refused to accept such sum or any other sum than the full amount of the said policy. That defendant Company thereupon deposited the identical money tendered to the plaintiff corporation, which was legal tender of the United States with the Clerk of the United States Circuit Court in which this action is pending, and for the purpose of keeping the said tender good.

This defendant has always been and still is ready and willing to pay the sum of money so tendered.

And defendant further answering says: That there was attached to or written in the said policy (but as to which the defendant does not know) the following clause, to-wit:

"Loss if any payable to M. D. Thatcher, Trustee, for the International Trust Company, of Denver, Colorado, as his interest may appear (Their regular subrogation clause attached to the policy." That as to the effect of the said clause upon the mortgagee clause hereinbefore mentioned, as attached to the said policy, this defendant is not advised, and prays the construction of the Court thereupon, but defendant Company is informed, and therefore alleges, that the said mortgagee clause is of no virtue or effect, and absolutely control-ed by the provisions of said policy written thereupon or attached thereto, 62 as aforesaid, making said M. D. Thatcher Trustee, payee in said policy, as his interests might appear, and that the said mortgagee clause, except as to the subrogation clause thereof, is of no force, virtue or effect, and never was by reason of the stipulation contained in said policy, to-wit: "Their regular subrogation clause attached to this policy," and by reason of the premises the only provision of said mortgagee clause attaching to said policy was the clause relating to subrogation. That if the said plaintiff Company have any interest in and to the said insurance, under and by virtue of the said mortgagee clause, the said policy and writings thereupon and attachments thereto and the said mortgagee clause, whether taken alone or collectively, were each and all void, and of no force and effect by reason of the concealment and misrepresentation as to the interests of the said Gordon in the said property, as aforesaid, and because the interests of the said Gordon were other than that stated in the policy, and because he did not own the ground upon which the building was erected in fee simple.

For a fourth and further answer and defense the said defendant alleges and says that the said policy contained the following condition or stipulation, to-wit:

"This entire policy, unless otherwise provided by agreement endorsed hereon, or added hereto, shall be void * * * If

any change other than by the death of an insured take
63 place in the interest, title or possession of the subject of insurance, except change of occupancy without increase of hazard, whether by legal process or judgment or by voluntary act of the insured, or otherwise."

Defendant alleges that a change took place after the writing, issuance, delivery and acceptance of the said policy of insurance in the title, interest, and possession of the subject of insurance, in that the said John R. Gordon on or about the third day of July, A. D. 1893, sold, transferred, and conveyed all of his right, title and interest, in and to the said hotel building and the property upon which the same was in course of construction, to the Mesa Hotel & Improvement Company by warranty deed acknowledged on the 3rd day of July, 1893, and filed for record in the County Clerk & Recorder's office of Pueblo County, on the 3d day of July, 1893, and recorded in Book 118, at page 580; the property conveyed by said warranty deed being lots 11 to 16 inclusive in Block 126, Pueblo; and in that the said John R. Gordon by his deed of trust dated July 11th, 1893, and recorded in Book 152 at page 126, on the 11th day of July, 1893, in the records of the Clerk & Recorder of Pueblo County, Colorado, conveyed to Robert Gibson, Trustee, lots 6 to 10 inclusive in Block 126, Pueblo, to secure two notes payable to the order of the Pueblo National Bank and W. A. Park, due in 90 days and six months respectively after the date, for the total sum of twenty-six hundred dollars ($2,600) with interest at 10
per cent per annum, it being a portion of the same
64 premises described in the plaintiff's complaint, as the ground upon which the said building was erected; that the defendant Company had no knowledge of the change of interest in and to the said premises until after the fire occurred; that no agreement was made by the defendant Company either with the said Gordon or Thatcher, Trustee, or the plaintiff Company providing for a change of interest in and to the said property and no such agreement or any agreement in relation thereto was endorsed on or added to the said policy or otherwise; that by reason of the breach of the said condition or stipulation as aforesaid, the said policy thereby became absolutely void as to the said Gordon.

The said policy further provided:

"If with the consent of this Company an interest under the policy shall exist in favor of a mortgagee or of any person or corporation having an interest in the subject of insurance other than the interest of the insured, as described herein, the conditions hereinbefore contained shall apply in the manner expressed in such provisions and conditions of insurance relating to such interest as shall be written upon, attached or appended hereto."

That attached to said policy and made a part thereof before its delivery was a mortgagee clause, which, among others, contains the following provision:

"This insurance as to the interest of the mortgagee (or trustee) only therein, shall not be invalidated by any act or neglect of the mortgagor or owner of the within described property * * * nor by any change in the title or ownership of the property * * * provided also, that the mortgagee
65 (or trustee) shall notify this Company of any change of ownership or occupancy or increase of hazard which shall come to the knowledge of said mortgagee (or trustee) and unless permitted by this policy, it shall be noted thereon."

Defendant alleges, and as will more fully appear from the mortgagee clause attached to said policy, and set out by the plaintiff in his complaint herein filed, said M. D. Thatcher, Trustee, had no interest whatsoever in the insurance under said policy or mortgagee clause, but that loss, if any thereunder, was payable to the plaintiff corporation. That the mortgagee clause did not purport to exempt the plaintiff Company from the acts of the said Gordon, and defendant alleges that it did not exempt the said Gordon from said acts.

Wherefore, as defendant is by counsel advised, the said mortgagee clause was likewise rendered wholly void or was void at the time of the issuance of the alleged policy, and defendant further answering says that attached to said policy is a clause, which, among other things, provides: "Their regular subrogation clause attached to this policy," that said clause refers to the mortgagee clause hereinbefore mentioned as being attached to said policy. That by reason of the premises the only provision of the said mortgagee clause attaching to said policy was the clause relating to subrogation.

That, therefore, if plaintiff Company had any rights under and by virtue of said mortgagee clause, said clause and
66 policy were rendered wholly void, and of no force and effect by reason of the conveyances of the said property by the said Gordon, as aforesaid.

And defendant further answering says: That upon information and belief both the plaintiff corporation and said M. D. Thatcher, Trustee, were fully informed of the said sale and transfer and change of ownership by the said Gordon, as aforesaid, yet, fully knowing that the ownership of the said property had been changed, as aforesaid, both the plaintiff and the said Thatcher wholly failed and neglected to notify the defendant of the said change of ownership, and wholly failed and neglected to have permission for the said change of ownership endorsed upon the said policy, as provided by the said mortgagee clause, and by reason whereof the said policy and mortgagee clause were void at the time of the said fire, as to the plaintiff Company.

Defendant further alleges that the said policy of insurance provides that loss, if any, is payable to M. D. Thatcher, Trustee, for the International Trust Company, as his interest may appear, but whether this provision is written in the body of the policy or whether it is written on a separate piece of paper and attached, or whether it is written by hand on a separate piece of paper and attached to the policy, this defendant has no knowledge, but alleges that it is either one or the other, and begs leave to refer to the original policy upon the trial of this cause. That as to the effect upon the said mortgagee clause of the foregoing clause, making loss payable to M. D. Thatcher, Trustee, this defendant is not
67
advised. But defendant is informed, and so alleges, that the said clause, being in writing, absolutely controls, and that, therefore, the mortgagee clause hereinbefore mentioned, is void and of no force and effect, and that by reason of the transfer of the property by the said Gordon, as aforesaid, and the conveyance of all his interest therein, the said policy and its attachments becomes void, and of no effect as to any supposed interest of the plaintiff Company.

And for a further and fifth answer and defense the said defendant says: That it is informed and believes and so upon information and belief alleges, that long prior to the 14th day of June, A. D., 1893, and prior to the 14th day of January, A. D., 1893, and at a date when this defendant is unable to state, the plaintiff corporation sold, transferred, and assigned to the Investor- Mortgage Security Company, Limited, of Scotland, Kingdom of Great Britain and Ireland, all of its right, title, interest in and to the note and securities and indebtedness of and from said John R. Gordon to the plaintiff Corporation; and that on the 14th day of June, A. D., 1893, at the time of the issuance of the policy, upon which it is brought, the plaintiff corporation was not the owner or holder of such indebtedness or the evidence thereof, or the securities thereof, but at all times between the said dates, and for sometime thereafter, the said note, securities, and indebtedness were held and owned by the said The Investors Mortgagee Security Company, Limited, and the said plaintiff
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Company had no title or interest therein, and had ceased to be either the owner or the holder thereof. That defendant Com-

pany had no knowledge of said sale or transfer of the said notes and securities as aforesaid.

That therefore by reason thereof the said policy was absolutely void at its inception, and likewise the mortgagee clause thereto attached, as to any supposed interest of The International Trust Company therein.

For a sixth and further answer and defence the said defendant alleges that the said policy provides that:

"This entire policy, unless otherwise provided by agreement endorsed hereon or added hereto, shall be void * * * if the hazard be increased by any means within the control or knowledge of the insured * * * or if the building herein described whether intended for occupancy by owner or tenant be or become vacant or unoccupied and so remain for ten days."

It says that after the 14th day of June, 1893, and after the issuance of said policy, and long before the alleged fire, the hazard connected with said property was greatly increased by means within the control and knowledge of the insured, by reason of the fact that building operations upon said property were suspended while said building was unfinished and incomplete, and said building was left standing in an unfinished state, open, unoccupied, abandoned and exposed, and without
any watchman or custodian in charge, and so remained
69 up to the time of its destruction by fire all without the
agreement of defendant endorsed upon said policy or
added thereto, or otherwise; that by reason thereof the said policy became wholly void as to the said Gordon.

The said policy also provides:

"If, with the consent of this Company, an interest under this policy shall exist in favor of a mortgagee or of any person or corporation having an interest in the subject of insurance other than the interest of the insured as described herein, the conditions hereinbefore contained shall apply in the manner expressed in such provisions and conditions of insurance relating to such interest as shall be written upon, attached, or appended hereto."

That attached to said policy is a mortgagee clause which was executed contemporaneously with the issuance of said policy and before its delivery, which clause, amongst other provisions, contains the following:

"This insurance, as to the interest of the mortgagee (or trustee) only therein, shall not be invalidated by any act or neglect of the mortgagor or owner of the within described property * * * nor by the occupation of the premises for purposes more hazardous than are permitted by this policy * * * provided also, that the mortgagee (or trustee) shall notify this Company of any change of ownership or occupancy or increase of hazard, which shall come to the knowledge of said mortgagee (or trustee) and unless permitted by this policy, it shall be noted thereon, and the mortgagee (or trustee) shall on demand pay the premium for such increased hazard for the term of the use thereof; otherwise, this policy shall be null and void."

Defendant alleges, as will more fully appear from said
70 mortgagee clause attached to said policy, as set out by
the plaintiff in his complaint herein filed, that said M. D. Thatcher, Trustee, had no interest whatsoever in the insurance under said policy or mortgagee clause, but the loss, if any thereunder, was payable to the plaintiff corporation. That the said mortgagee clause does not exempt the said plaintiff Company from the neglect and failure of the insured to notify the defendant Company of any change or increase of hazard or continuance of hazard, or to have the permission for such change or increase of hazard endorsed on said policy, or from failure to keep a watchman upon the said premises, as aforesaid, or from any other act or neglect of the said Gordon. That by reason of the said increase of hazard, as hereinbefore alleged, the said policy and mortgagee clause became wholly void as to any supposed interest of the plaintiff Company in and to said insurance, and was void at the time of fire.

And further answering in this behalf, defendant says upon information and belief, that the plaintiff corporation was furthermore informed and aware of the fact that the hazard connected with said property was greatly increased as aforesaid, and yet, although said facts were well known to defendant, plaintiffs, and the said trustee, nevertheless the plaintiff wholly neglected and failed to obtain from defendant consent for the existence and continuance of said increased hazard, and wholly failed and neglected to have any permission therefor endorsed
upon the policy, or to pay any premium for any such
71 increased hazard. And although plaintiffs were in-
formed that in order to secure permission for the continuance of said insurance by defendant Company, it would be necessary among other things to provide and have a watchman upon said premises, nevertheless, although plaintiffs could and should have procured a watchman to be placed in charge of said property, the plaintiffs wholly neglected and failed to procure or to have procured a watchman for said premises; but allowed said premises and building to remain open and unprotected and in the condition of increased hazard as aforesaid, up to the time of the destruction of the said building by fire.

Defendant further answering says: That attached to said policy is a clause containing the following provision: "Their regular subrogation clause attached to this policy." Defendant alleges that this clause refers to the subrogation clause of the mortgagee clause attached to said policy. That by reason of said stipulation the said mortgagee clause was only of force and effect so far as it related to subrogation, and that, by reason thereof, the said mortgagee clause became, and was from its inception, wholly void, except as to the part relating to subrogation.

Defendant further alleges that by the terms and provisions of said policy loss, if any, is made payable to M. D. Thatcher, Trustee, of the International Trust Company, as his interest may appear, which said provision was either written in
72 the body of the policy, or is typewritten on a separate piece of paper and attached to the policy, or is written by hand on a separate piece of paper and attached to the policy, but as to which this defendant has no knowledge. That as to the effect of said clause upon the mortgagee clause attached to the said policy, making the loss payable to the International Trust Company, this defendant is not advised. But defendant is informed and so alleges that the said clause absolutely controls the mortgagee clause and renders it void and nugatory, except as to the clause therein relating to subrogation. That by reason of the premises and the change and increase of hazard, as hereinbefore alleged, the said policy and all attachments thereto became absolutely void and of no force or effect, at the time of said fire.

Wherefore, for the foregoing reasons defendant Company prays that it may go hence and have judgment for its costs in this cause expended to be taxed.

MILTON SMITH,
Atty. for the Sun Insurance Company, Defendant.

* * * * * * *

73 In the Circuit Court of the United States within and for the District of Colorado.

The International Trust Company, Complainant,
vs.
The Sun Insurance Office, Defendant.

REPLICATION.

Now comes the above-named plaintiff, The International Trust Company, and for reply to the answer heretofore filed by the Sun Insurance Office, defendant, alleges as follows:

I.

Plaintiff denies that the request for the premium upon the policy mentioned and described in the plaintiff's 74 complaint herein, was made at the request of John R. Gordon, and denies that the said payment was made by the plaintiff for and on behalf of the said Gordon or under and by virtue of an arrangement and agreement between the said Gordon and the plaintiff, as is alleged in defendant's answer.

II.

Plaintiff admits that the said defendant tendered to the plaintiff a sum of money being as is alleged by said defendant, a portion of the premium upon said policy of insurance, but alleges that said tender was not made until the 21st day of February, A. D. 1894 and long after the liability of said defendant had accrued upon said policy of insurance.

III.

Plaintiff denies that it had no insurable interest in the property covered by the said policy of insurance, as in the thirteenth paragraph of said answer alleged.

IV.

Plaintiff denies that the proofs of loss, as called for by said policy and made by the said plaintiff and by said John R. Gordon, were rejected, as in the sixteenth paragraph of said answer alleged.

V.

75 Plaintiff denies that this action was brought within a period much less than sixty days after the furnishing of proofs of loss by the plaintiff and the said John R. Gordon, and alleges that such suit was brought after the expiration of sixty days from the date of the furnishing of such proofs of loss.

Plaintiff denies that neither it nor the said John R. Gordon furnished complete proofs of loss, as required by the terms of said policy, as in the twentieth paragraph of said answer alleged.

VI.

For reply to the 21st paragraph of said answer, said plaintiff says that in and by the mortgagee clause to said policy of insurance attached, it is provided: "The loss, if any, is made payable to The International Trust Company of Denver, Colorado, and its assigns",—the said International Trust Company being the plaintiff in this action that attached to said policy of insurance is a description of the property insured, written upon an attached slip of paper; that such attached slip of paper is no part of the mortgagee clause above referred to, and that in and by said attached paper appears the following: "Loss, if any, payable to M. D. Thatcher, Trustee for The International Trust Company of Denver, Colorado, as his interest may appear. (Their regular subrogation clause attached to policy)"; and plaintiff denies that by reason of the said mortgagee clause and the said description of the said property insured, attached to said policy of insurance, the proper 76 person to sue upon said policy is M. D. Thatcher, Trustee, and denies that the suit of the plaintiff in this action is improperly brought, as is alleged in the 21st paragraph of said answer.

And further answering said 21st paragraph of said answer, plaintiff alleges that said M. D. Thatcher has not now and never had any interest whatsoever in the debt due by said Gordon, and was interested in said real estate as naked Trustee only. And plaintiff furthermore alleges that the insertion of the above clause at variance with the regular mortgagee clause attached to said policy was an error and over-sight on the part of the agents issuing said policy of insurance.

VII.

Plaintiff denies that it and the defendant differed and disagreed as to the amount of loss or damage occasioned by the fire mentioned in plaintiff's complaint; denies that defendant Company notified the plaintiff that the estimate of the amount of loss which the plaintiff Company had made was neither satisfactory nor correct, and denies that the defendant Company claimed that it would insist upon a compliance with the terms and provisions of the policy in relation to ascertainment and estimate of the loss, as is alleged in the 27th paragraph of said answer; but on the contrary alleges that no demand whatsoever was ever made upon, plaintiff for any appraisement or valuation of the property destroyed.

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VIII.

Plaintiff admits that there has been no appointment of appraisers to determine the amount of the loss under said policy, and alleges that there was no necessity for the appointment of any appraisers to determine the amount of said loss, for the reason that the said defendant at no time made any proposal to the plaintiff herein for the appointment of appraisers to ascertain the loss under such policy; but on the contrary alleges that defendant always denied its liability under said policy. Plaintiff denies that it did not offer to appoint an appraiser or to submit to an appraisement, as in and by one of the provisions of said policy required, and further alleges that it was ready and willing at all times prior to the bringing of this said action to submit thereto and to comply with any and all of the provisions of said policy of insurance, of all of which the defendant had notice.

IX.

Plaintiff denies that the proofs of loss presented by the said plaintiff and said John R. Gordon, about the 3rd of November, 1893, were materially defective and erroneous, and alleges that said proofs of loss were fully complete in every particular. Plaintiff denies that it ever did in any way admit or find that its proofs of loss were defective, and denies that such was the
case. Plaintiff denies that it ever did, directly or indi-
78 rectly, revoke or withdraw any proofs of loss furnished
defendant or that it ever did any act to affect the validity of its original proofs of loss.

Plaintiff denies that it neither before nor after the bringing of this suit, or at any time, furnished satisfactory proofs of loss, as provided by said policy, but on the contrary alleges that the proofs of loss furnished by it were furnished in strict compliance with the provision of the policy in relation to the furnishing of proofs of loss.

X.

Plaintiff denies that neither the plaintiff nor the said Gordon have fully or otherwise complied with the terms of the said policy; denies that it and the said Gordon have failed to furnish satisfactory proofs of loss to the defendant Company, as in the 30th paragraph of said answer alleged; denies that the parties to this action differed and disagreed as to the amount of said loss, and denies that the plaintiff Company has waived its rights to recover upon said policy and said mortgagee clause or either of them, as in the 30th paragraph of said answer alleged. Plaintiff admits that M. D. Thatcher did not furnish any proofs of loss to the defendant Company, but alleges that there is no provision in the said policy requiring said M. D. Thatcher to make proofs of loss to defendant.

XI.

For reply to the 32nd paragraph of said answer,
79 plaintiff refers to the policy of insurance in this case, a
copy of which is attached to the bill of complaint filed herein.

XII.

As to whether John R. Gordon did, on the 12th day of June, 1893, by his deed of trust, acknowledged and recorded on said

12th day of June, 1893, in the records of the County Clerk and Recorder of Pueblo County, in Book 152, page 57, convey to Thomas J. Downen, Lots six to ten inclusive in Block one hundred and twenty-six (126), South Pueblo, now part of the City of Pueblo, Colorado, to secure his note of the same date, payable to the order of John S. Ryland, six months after date thereof, for five thousand dollars ($5,000) with interest thereon at eight (8) per cent per annum, this plain---- has not sufficient information upon which to form a belief, and therefore denies the same.

And further replying to the allegations of said answer in that behalf, plaintiff says that the said lots 6 to 10 inclusive in Block 126, South Pueblo, are no part of the premises conveyed to this plaintiff by the said John R. Gordon in his deed of trust of December 12th, 1892, as is more particularly set forth in plaintiff's complaint herein, and said lots 6 to 10 inclusive are no part of the property upon which the said Mesa Hotel building was being constructed at the time of the issuing of the policy herein sued upon; that while in plaintiff's complaint it is alleged that the said property upon which the Mesa
80 Hotel building in course of construction included lots 6
to 10 aforesaid, yet plaintiff now says that the insertion of said lots 6 to 10 in said complaint was a typographical error.

XIII.

Plaintiff denies that at the time of the issuance of the policy herein, said John R. Gordon was not the sole owner of the property and ground upon which the said building was being erected by the said Gordon; denies that it was not owned in fee simple by the said Gordon and denies that the said Gordon had no interest whatsoever therein (as required by said policy of insurance) as in the 35th paragraph of said answer alleged; denies that the said Gordon or the plaintiff Company made any misrepresentations whatever to the said defendant, as to the interest of the said Gordon in the property covered by the said policy of insurance, as in the 35th paragraph of said answer alleged.

And further replying to the allegations of said answer in relation to the transfer of said Lots 6 to 10 inclusive, by the said John R. Gordon, on the 12th day of June, 1893, plaintiff alleges that neither it nor the said M. D. Thatcher had any knowledge whatever of the said transfer by said Gordon until the filing of the answer of this defendant in this case.

XIV.

Plaintiff admits that neither it nor the said M. D. Thatcher as Trustee, notified the defendant Company of the deed 81 of trust conveying said lots 6 to 10 inclusive, not having notice or knowledge of the same, but as to whether the said John R. Gordon so notified the said defendant, this plaintiff has not sufficient knowledge or information upon which to base a belief, and therefore denies that the said John R. Gordon failed to so notify the said defendant. Plaintiff denies that either it or the said M. D. Thatcher or the said John R. Gordon concealed or misrepresented the interest of the said Gordon in the property included in said deed of trust given to Thomas Downen, as in the 36th paragraph of said answer alleged.

XV.

Plaintiff denies that the interest of the said Gordon was not truly stated in said policy, as in the 37th paragraph of said answer alleged. Plaintiff admits that on the 21st day of February, 1894, the said defendant tendered to plaintiff the sum ef $72.21, in and by such tender claiming that the sum of $52.50 was the amount of the premium paid upon the policy herein sued upon, and that the sum of $19.71 was the amount of costs which had accrued, at the time of the tender, in this cause in the Circuit Court of the United States for the District of Colorado, and plaintiff admits that it refused to accept such sum or any other sum than the full amount of said policy.

82 XVI.

For reply to the 41st paragraph of said answer, plaintiff refers to the policy herein sued on and to the mortgagee clause attached thereto, a copy of which is filed with the complaint in this cause.

XVII.

Plaintiff admits that a change did take place in the title, interest and possession of the subject of insurance after the writing, issuance, delivery and acceptance of the policy of insurance herein; that such change of title took place on or about the 3rd day of July, 1893, as in the 43rd paragraph of said answer alleged, but plaintiff avers that such transfer of said property by the said John R. Gordon was without the knowledge, sanction or consent of either this plaintiff or of the said M. D. Thatcher, Trustee, and that neither the said plaintiff nor the said M. D. Thatcher, Trustee, knew of such transfer by the said John R. Gordon until after the property covered by the said policy of insurance had been destroyed by fire. Plaintiff denies that the said defendant had no knowledge of the change of interest in the said premises so conveyed by the said John R. Gordon, until after the fire occurred, but upon information and belief states the fact to be, that immediately after said transfer, and long before said fire occurred, said defendant had notice of such transfer.

83 XVIII.

Plaintiff denies that either it or the said M. D. Thatcher, Trustee, were ever informed of the sale, transfer and change of ownership of the property covered by said policy of insurance, as in the 48th paragraph of said answer alleged.

XIX. [XIX.]

For reply to the 49th paragraph of said answer, plaintiff refers to the policy of insurance herein sued on, and the mortgagee clause thereto attached, a copy of which is filed with the complaint in this action.

XX.

For reply to the 50th paragraph of said answer, plaintiff admits that it did, prior to the 14th day of June, 1893, sell and dispose of said Gordon note as is alleged in said answer, but denies that on the 14th day of June aforesaid it was not the owner of said note and indebtedness. On the contrary, plaintiff alleges that prior to said date it had repurchased said note and was on the date aforesaid the owner thereof.

XXI.

Plaintiff denies that after the 14th day of June, 1893, and after the issuance of said policy, and long before the fire, the hazard connected with said property was greatly increased; denies that said hazard was increased within the control or knowledge of the insured, as in the 52nd paragraph of said answer alleged.

84 And further answering said 52nd paragraph of said answer, plaintiff alleges that from the making and execution of said policy of insurance herein sued upon, until the 9th day of October, 1893, when said property was destroyed by fire, no material change was made in the condition or situation of said property, and the hazard connected therewith was in no wise increased or enhanced. Plaintiff alleges that building operations upon said building had been suspended at the date said policy was issued, and that defendant, at the time of the issuance of said policy, had full notice and knowledge thereof and was fully advised of the condition of said property and of the character of the risk.

XXII.

Replying to paragraph 56 of defendant's answer, plaintiff alleges that it was not necessary to obtain the consent of defendant to an increase of risk, as no such increase ever occurred after said policy was issued. Plaintiff denies that it was informed that in order to secure permission for the continuance of insurance by defendant it would be necessary, among other things, to provide and have a watchman upon said premises.

And for further reply to the allegations set forth in the answer of said defendant, plaintiff alleges that long prior to the bringing of this suit the said defendant claimed and so notified plaintiff that it was in no wise liable to said plaintiff on
85 the policy of insurance which is the subject of this action, and on the 21st day of February, 1894, the said defendant made claim and notified this plaintiff that it was in no way liable upon said policy of insurance; and proposed to this plaintiff to cancel said policy of insurance and return to this plaintiff the amount of the premium paid upon said policy by plaintiff, less the earned premium thereof which had accrued between the date of the issuing, of said policy and the 9th day of October, 1893.

And further answering in this behalf, plaintiff alleges that subsequent to the fire which destroyed the property covered by said policy of insurance, it was ready and willing to comply with all conditions and requirements of the said policy of insurance and so notified the said defendant; that said plaintiff did comply with all requests made by defendant upon it; that notwithstanding the fact that said defendant was notified by said plaintiff that it was ready to comply with any request made by defendant upon it, under the terms of said policy, yet, at no time did said defendant ever notify plaintiff or make any request of of it that arbitrators ahould be appointed to ascertain the amount of loss occasioned by said fire; but on the contrary at all times claimed to this plaintiff that it was in no way liable upon said policy of insurance, except for the unearned premium paid by plaintiff to said defendant.

Wherefore, plaintiff prays judgment as it hath prayed
86 in its complaint heretofore filed herein.

A. E. PATTISON,
A. J. BEAUMONT,
A. C. CAMPBELL,
Counsel for Plaintiff.

* * * * * * *

In the Circuit Court of the United States within and for the District of Colorado.

STIPULATION.

The International Trust Company, Plaintiff,
vs.
The Sun Insurance Office, Defendant.

87 It is hereby stipulated and agreed, by the parties hereto, that this cause shall be tried by the Court without a jury, a trial by jury being hereby waived.

A. E. PATTISON,
A. J. BEAUMONT,
A. C. CAMPBELL,
Attorneys for Plaintiff.

MILTON SMITH,
Attorney for Defendant.

* * * * * * *

101 Tuesday March 19th A. D. 1895.

MONEY DEMAND.

The International Trust Company
3061 vs.
The Sun Insurance Office.

On this 19th day of March A. D. 1895, the same being one of the regular juridical days of the November term A. D. 1894 of this Court, there being present the Honorable John A. Riner, District Judge of the District of Wyoming assigned to the District of Colorado.

It is considered by the Court that the plaintiff do have and recover of and from the defendant, Five thousand four hundred and eighty-four dollars and forty-four cents ($5,484.44) its damages by occasion of the premises in its complaint mentioned in form aforesaid assessed and its costs by it in this behalf laid out and expended, to be taxed and have execution therefor.

* * * * * * *

103 United States of America,
District of Colorado—ss.

In the Circuit Court of the United States, within and for said District.

The International Trust Company, Complainant,
vs.
The Sun Insurance Office, Defendant.

APPEARANCES.

For Complainant, A. C. Campbell, Esq.

For Defendant, Milton Smith, Esq.

BILL OF EXCEPTIONS.

Be it remembered, that on this 12th day of March, A. D. 1895, the same being one of the regular juridical days of the November, A. D. 1894 Term of said Court, the said cause came on for trial before the Court, Hon. John A. Riner, presiding, without a jury, a jury having been by stipulation in writing of the respective parties expressly waived; and thereupon the plaintiff to sustain the issues on its behalf gave in evidence as follows, that is to say:

104 Henry W. Hobson, a witness produced, sworn and examined on behalf of plaintiff, testified as follows:

Direct Examination.

By A. C. Campbell, Esq.

Q. Mr. Hobson, state you- name, place of residence and occupation.
A. My name is Henry W. Hobson—

uefendants object to the giving of any testimony in this case, because the petition does not state facts sufficient to constitute a cause of action. Objection over-ruled. To which ruling defendants duly excepted.

Witness: reside i nenver; my business is that of attorney at law.
Q. What connection, if any, have you with the plaintiff in this case, The International Trust Company?
A. I am the Vice-President, and my firm has always been [council] for the Trust Company. I have been either first or second vice-president of the company ever since its organization in 1892.
Q. Are you acquainted with one John R. Gordon?
A. I am.

Q. Who owned the property in Pueblo destroyed in October, 1892?

A. I am.

Q. Now, you can state Mr. Hobson, whether or not, in December, 1892, John R. Gordon negotiated a loan with The International Trust Company and, if so, state the date and the amount; and what securities were given for that loan.

A. Mr. Gordon in the early part of December, 1892, ap-
plied orally to the Trust Company, and applied to me
105 personally; I at that time as vice-president and having
great familiarity with the Trust Company's business
was giving a good deal of attention to the executive business of the company; and after some negotiations he made a written application, dated the 8th day of December, 1892, for a loan of $50,000; and I have the application here.

Plaintiff offers said application in evidence and the same is received and marked Exhibit 1.

Witness: The application was for $50,000. Shall I read the application?

The Court: It is not necessary to read that in evidence.

Witness: The only material part of it is that it was to be secured by deed of trust upon certain lots in Pueblo, 11 to 16, block 126, inclusive, and an agreement to keep $60,000 insurance on the property. I immediately sent Mr. Gibson, our assistant secretary, to Pueblo, to investigate the loan, and after the report was made it was brought before the executive committee, and that application that was made to me for a loan was approved; the approval, I think, was on the 12th of December; in fact, I am quite sure, the 12th of December, 1892.

Q. Now, when was the loan made?

A. We accepted the loan on the 12th day of December, 1892, and all of the papers were dated as of that date—the notes, deeds of trust, &c.

Q. What papers have you there as evidence of this loan?

A. After the loan was accepted the papers were prepared,
and I have here the original note, dated December 12,
106 1892, signed by John R. Gordon; and also the original
deed of trust, which was dated on the 12th day of December, and acknowledged on the 13th.

Mr. Campbell: We offer these two papers in evidence to be marked Exhibits 2 and 3.

Witness: Since the papers were executed we paid over the money to Mr. Gordon.

Q. When was the money paid over?

A. I thought I had the checks here Mr. Campbell, but I have not. It was within a day or two after the papers were signed. There were some little preliminary matters in the way of getting the papers signed, &c., but it was within two or three days after the 12th. We paid over the money, the entire amount less the expense of the loan, including the commission of one per cent., I believe on the loan.

Q. Now, what, if anything, was said or done about keeping the property insured at that time?

A. Well, the applicant agrees that the property shall be kept insured during the period of the loan—the loan was for six months—for $60,000.

Q. Do you know how much insurance was on that hotel property, sir, at the time that loan was negotiated?

Defendants object because immaterial. Objection overruled.

To which ruling of the Court the defendants duly excepted.

Witness: No sir, I do not know what was on at the time the loan was negotiated I [I] know that within a very few days
after the loan was made there was $60,000 insurance on
107 it. Policies were received by us for $60,000.

Q. Now, in order that we may be advised in this matter, the property you took the loan on was known as——

A. It was known as the Mesa Hotel property. It was a hotel. It was commenced in the summer before and it was almost as much completed as it was on the date of the fire. As a matter of fact Mr. Gordon never put any of our money on the hotel, to any extent. It stood very much at the date of the loan as it did at the date of the fire.

The Court: These offers that you have made of the application the trust deed, and the note, if you wish to offer them in evidence, and they object to them, the objection is overruled and they have their exception.

Mr. Smith: We have no objection.

The Court: Well, then, you will be allowed to withdraw the originals upon leaving a copy with the stenographer.

Mr. Smith: We have no objection to making copies of any of these papers after they have been offered in evidence.

Q. Now, what was done with this loan after the deed and deed of trust and note were delivered to your company by Mr. Gordon?

A. After we had completed the loan and got everything straightened out we offered it to the Company, the Scottish Company, a correspondent of ours known as the Investors'

Mortgage and Security Company, Limited—I believe that was its corporate name; and on or about December 29th we sold the loan to them and transferred the note. We were their regular
agents in this country, that is, their regular corre-
108 spondents. We sold them a good many loans before
that, and have sold them a good many since. And as soon as we had sold the loan we sent the note either to them directly or to their New York depositaries, Cuyler, Morgan & Company, one or the other, and all the other papers we kept, the agreement, the deed of trust, the insurance policies, and all other papers relating to the loan. They have always been in our possession.

Q. What obligation was your Company under, if any, to the Scottish Company, to whom you sold this note, to repay it on its becoming due?

Mr. Smith: If the court please we object to the statement as immaterial and irrelevant, and that the note itself is the best evidence. The note is in evidence and is endorsed and shows what obligation the International Trust Company were under to the Scottish Company. It is assigned without recourse and they cannot give verbal testimony with regard to it.

Mr. Campbell: If the court please we offer to prove by the witness that under an arrangement the International Trust Company had with the Scottish Company they were obliged to take care of any loan that they sold to the Scottish Company, on failure of the original party to the instrument to pay it on maturity.

The Court: How do you propose to do that Mr. Campbell, in the face of their endorsement to the contrary?

Mr. Campbell: That is a custom, if your Honor please, to endorse all of their notes in that way. They did not in writing guarantee any loan.

109 Witness: Our contract was different from that; it was on a contract to buy the loan—

Mr. Campbell: We propose to show that before they made any arrangement with this company at all they obligated themselves to take up any loan and pay it in case the parties themselves did not pay it.

The Court: Well, you will have to get your contract. The objection at present will be sustained.

To which ruling of the court the plaintiff duly excepted.

Q. Now when was that note repurchased, if it was repurchased from the Scottish Company?

A. It was repurchased, so far as our reacquiring the title of the note and owning it, on or about the 12th day of June, 1893. We never paid that loan, we repurchased it, and we had a contract with the Scottish Company not to pay loans, but to repurchase any loans that were not paid at maturity, if they desired us to do so. That loan has never been paid to this day.

Q. Now you say Mr. Hobson that this note was transferred and sold to the Scottish Company on the 29th of December, 1892, and then on the 12th of June, 1893, you repurchased it?

A. Our title dates from that date.

Q. Now how did you come to repurchase this loan?

A. Well, in order to explain that I will have to take the papers in the case. I have copies of them. Those were all introduced in the equity case. The way we came to
110 repurchase this loan Mr. Campbell, was this: When we first entered into relations with the Investors' Company to whom we sold this note we arranged with them to sell—

Defendants object.

The Court: I do not see Mr. Campbell, that that is material

Mr. Campbell: I am asking whether they purchased and how they came to do it on the 12th of June.

The Court: Mr. Hobson informed you in his former answer that they did it because of a contract. Now, that contract, I presume, is in writing, and if it is you must get the contract.

Witness: The loan became due on the 12th day of June, and no negotiations of any kind, any correspondence took place before May 26th. On May 26th we received a letter from Cuyler, Morgan & Company, who were the New York depositaries of all of the Investors' Company's securities.

Q. Have you that letter there?

A. I have a copy of it, not the original.

The Court: You may read your copy and if after comparison it is found to be a true copy of the original it may be substituted.

Q. State what that letter contains, from Cuyler, Morgan & Company?

A. The first letter of May 26th, addressed to the International Trust Company, is as follows: "We hold note No. 1026 "signed John R. Gordon, due Jan. 12", for $50,000 with coupon "attached for $1,750. Please inform us if you will send check "to us to take up this note, or if we shall forward same to you "for collection. Your prompt reply will oblige. Yours very "truly, per pro Cuyler Morgan & Co. A. C. Vaughan."

Q. (The Court) What is the date of that?

111 A. That is on the 26th of May, 1893. On the 29th of May,
1893—the original letter is in the papers—the following reply was sent by the International Trust Company to Cuyler, Morgan & Company: "Your two letters of the 26th instant "received. The Nichols coupon for $350 due 14th May was duly "paid and we sent you draft on State Trust Company for the "same on the 15th of May. I hope you received it all right. I "telegraphed you to this effect this morning. The Gordon note "for $50,000 with coupon attached for $1750 due 12th of June "you will kindly forward to this office for collection; do not "endorse the bill and coupon to our order but simply forward "them as they are and oblige. Yours very truly, John F. Bell, "Secretary." Upon the 2d of June, 1893, Cuyler, Morgan & Company wrote us the following letter: "We are in receipt of your "favor of the 29th ulto., contents of which we have noted and "we beg to advise you that we are to-day forwarding to your "good selves, for collection under registed cover and seal of our "notary the Gordon note for $50,000 with coupon for $1750 due "June 12th attached. Yours very truly per pro Cuyler, Morgan "& Co. D. P Kingsford." On the same date they sent us a formal printed letter simply enclosing the note. On June 7th Mr. Bell acknowledged receipt of the letter as follows: "This "is to acknowledge receipt of your valued favor of the 2nd "instant enclosing the note of John R. Gordon for $50,000 and "attached coupon for $1750 for collection as stated." On the 12th of June we received the following telegram from Cuyler, Morgan & Company—this telegram I remember very distinctly was received very early in the morning, and I saw it personally: "Is Gordon note paid Wire. Cuyler Morgan & Co." On the 12th of June we wrote this letter to Cuyler, Morgan & Company: "In regard to the loan of John R. Gordon held by the "Investors Mortgage Security Company, Limited, for $50,000, "we beg leave to advise you that as we were authorized to
"reinvest the money we have arranged to extend the loan
112 "six months, and herewith enclose you New York draft
"No. 258 on The State Trust Company for $1750 interest "to date. Be kind enough to acknowledge receipt." We also wrote them on same date as follows: "We have just sent you "draft for interest on the loan of Gordon on account of the In-"vestors Mortgage & Security Company and received your tele-"gram asking if the Gordon note was paid to wire. We judge "from that that was some expectation of the note being paid "and remittance made for other purposes, and we consequently "wired you to the effect that we understood that we were to re-"invest the money, and as no instructions to the contrary had

"been received we had arranged six months extension of the "loan, and we have wired the Investors Company that if they "desired it, we will take up the loan ourselves as soon as possible, probably in a few weeks. At the time the money was "placed in our hands it was distinctly understood that we should "re-invest it [as] the expiration of the Gordon loan, and as Mr. "Gordon desired an extension, and we had no contrary instructions we felt authorized to agree to the same. We however "never wish our correspondents to be dissatisfied and if the Investors Company wishes the money, we will take the loan off "their hands. We would do so immediately but for the fact "that money is very tight out here and we have arranged to use "all the money we can spare for the next few weeks. It may be "that within the next ten days we will take up the loan and remit to you. Yours very truly, John F. Bell, Secretary." We sent this telegram also to Cuyler, Morgan & Company on the same day: "It was understood we were to reinvest money, "Not instructed to contrary consequently arranged six months "extension loan. Interest remitted to-day. Wired Investors "Company if they desired we will take loan ourselves within "short while." This letter was sent to Guild & Shepherd on the same day: "This morning we received a message from Messrs. "Cuyler, Morgan & Company asking if the Gordon note had "been paid and to wire answer. In reply we sent telegram, "copy of which we herewith enclose you. At the same time we "wired you, copy of telegram herewith enclosed. You will remember that at the time this loan was made we agreed to reinvest the money for you and it was our distinct understanding that you desired us to do so. We have heretofore
113 "received no instructions to the contrary and we naturally presume that you wish your money to remain reinvested, and as Mr. Gordon has been unable on account of the "extreme tightness of the money market, and the difficulty in "getting money, to arrange a large loan which he had been negotiating, he applied for an extension and we had arranged to "extend his loan six months. Although as stated herewith we "understood that we were authorized to reinvest this money "which in my opinion would cover an extension of this loan. "but we wish you to be entirely satisfied in regard to it and I "am therefore authorized by our executive committee to say "that we will just as soon as possible, take up the Gordon loan "ourselves if you desire it and remit the money to Cuyler, "Morgan & Company to your credit. Please wire us upon receipt of this letter what your wishes are in the premises and "we will arrange to conform to them. Yours very truly, John "F. Bell, Secretary. We remit to Cuyler, Morgan & Co. to-day $1750 interest to date on above loan." That was paid by ourselves and not by Mr. Gordon.

Q. (The Court): What was the date of that?

A. On the 12th of June On the same day we sent to Guild
& Shepherd—their Cable Address being "Equitable, Edinburg"
—the following "Cuyler wires about payment Gordon note.
Presuming we "re-invest arranged six months extension. Can
take loan our "selves soon if desired. Wait our letter of this
date." After that correspondence that I have just read had
been written and sent, by a later mail on the same day we had
the following letter from Guild & Shepherd, and the correspondence
that I have read does not refer to this letter which I will read
in a moment, at all. It was received by a later mail, after we sent
the telegram. This is dated Edinburg 31st May, 1893. "We duly
"received your letter of the 12th inst. in which you submitted to
"us two loans of $4,000 and $40,000 respectively." Those were
other loans. And then follows another matter about those
loans, until we get to the last clause: "We are so short of
"funds at present, that on the re-payment of the Pueblo loan
"on the 12th prox. we shall require the money at our
114 "bankers in New York. Yours truly, Guild & Shepherd.
"P. S. When the Pueblo loan has been repaid and
"remitted to New York, you might kindly cable the word
"Pueblo." After the receipt of this letter on the next day, June
13th—this letter was received on the 12th of June—we say as
follows, to Guild & Shepherd:
"referring to [out] letter and telegram of yesterday, we beg
leave to say that we are just in receipt of your favor of May
31st in which you say as follows, to-wit: 'We are so short of
funds at present that on the repayment of the Pueblo loan on
the 12th proximo we shall require money at our bankers in
New York.'

115 " I greatly regret that we did not receive such instructions
" a little earlier as we could have arranged to let
" you have the money promptly on the 12th but as you will
" remember when we made the Gordon loan it was understood
" that we were to reinvest this money and if we had not arranged
" to extend the loan to Mr. Gordon we should, in the
" absence of instructions to the contrary, have arranged for
" reinvestment so that you would not lose any interest. Confirming
" my letter of yesterday, the best that I can do under
" the circumstances is to say that we will ourselves just as
" soon as possible, if you desire it, take up the loan and carry
" it ourselves. We would do so immediately but for the fact
" that times have been very hard here and we have been compelled
" to renew loans and to carry our customers for considerable
" amount which makes us pretty short in funds at present,
" but we are expecting some large loans to be paid between
" now and the first of July. You need not have the least

" anxiety about this loan or security, for whilst we do not legally guarantee any loans, we always stand back of our correspondents and protect them, and at any time we would rather take up a loan than to have them dissatisfied. To be perfectly frank it would be quite inconvenient to us to take up this loan at present, as we need all of our money, and if entirely agreeable to you we would like to have the privilege of taking it up at any time within sixty days from its maturity, viz. at any time before August 12th. We remitted yesterday to Messrs. Cuyler, Morgan & Co. $1750 the interest upon this loan for the past six months Notwithstanding the hard times, the general condition in this State is good and I think that Denver may boast of the best condition of any city of its size in the United States. The fall in our silver was largely discounted, and we have no fear here of anything more than a dullness and depression for a time. Awaiting your further advices and wishes, I am, yours very truly, "John F. Bell, Sec'y." This letter was received, as I say after the other letters had been answered. When the other letters were received and this letter was answered I immediately conferred with the executive committee of the Trust Company—and, in fact, before this letter was received—and was authorized by the executive committee to repurchase the 116 loan in pursuance of the contract which I have mentioned, and I had even made arrangements to borrow the money of the First National Bank and repurchase the loan from Cuyler, Morgan & Company, although we did not care to do it within 60 days if we could get the time.

Q. Cuyler, Morgan & Company were the agents of this Company?

A. They were intermediate agents. At the same time, on the 12th of June, I wrote a letter to Mr. Gordon—it is in the other papers—in which I notified Mr. Gordon that we had been called upon to take up the loan and had concluded to do so, and notified him that we were the owners of the loan and from that time we would deal with him.

Q. What was the date of that letter?

A. That letter was dated, I think, on June 12th, but I cannot remember.

Defendants object to the letter written to Mr. Gordon, as not in any way relating to the repurchase of this loan, and because not material. Furthermore, that the letter itself should be produced.

Objection overruled. To which ruling of the Court the defendants excepted.

A. That constitutes all of the letters and telegrams which we sent to Cuyler, Morgan & Company and to Guild & Shepherd on the 12th, and as I stated before, at that time we paid the interest ourselves promptly and remitted to them.

Q. I believe that you stated that the interest was paid on the 12th of June?

A. Yes sir, it was remitted to Cuyler, Morgan & Company on the 12th of June. We were waiting advices from them as to whether they would give us 60 days extension to pay the balance of the loan, the principal of the $50,000. From that
117 time this loan was our loan and we paid interest from the 12th of June to Investors Company, when we finally took it up, and we paid interest up to September, and then we arranged with them for a renewal of a year on our note, gave them our own note in September, but took it up before the year was up, but paid the interest ourselves on the loan. On the 15th of June Cuyler Morgan & Company wrote us the following letter: "Dear Sir: We beg to acknowledge receipt of "your two favors of 12th inst. with remittance of $1,750, being "interest due on Gordon $50,000 note of a–c of Investors Mge. "Security Co., for which we thank you. We note the contents "of your letters and are writing the Investors Co. in this connection. We remain yours very truly, Cuyler, Morgan & "Co." On the 26th of June we had the following telegram from Guild & Shepherd: "Have received you letter of 13th June, we "will delay until 15th of September." That telegram was in reply to our offer to take up the loan and asking them to give us 60 days in which to pay the balance over and above the interest, and their telegram was as I have read. We also received the following letter from Guild & Shepherd, dated June 14:

"We beg to confirm the following cable message which we "received from you on the 13th inst. 'Cuyler wires about payment of Gordon note Presuming we to reinvest. Arranged 6 "months extension. Can take loan ourselves soon if desired. "Wait my letter of this date. We accordingly wait your "letter.'" On June 26th we wrote the following letter to Messrs. Guild & Shepherd: "We are in receipt this morning of "a cablegram from you as follows: "Then follows the telegram "I have just read. This is satisfactory to us and we will arrange to take up the loan at that time. We would so now "but as we wrote you, it would be quite an inconvenience for "us in view of the hard times——"

118 Q. (Mr Smith) Is that June 26th?

A. June 26th yes sir. "——We have the note here, and "I would suggest that as we are to take it up, that we hold it "for the present, and send to you to be endorsed over to us. The "note now stands in your name, consequently we will wish it "endorsed to us when we take it up. Thanking you for your "courtesy, and regretting that we should have misunderstood "your wishes in this matter, I am, yours truly, John F. Bell, "Secretary." The note had been sent out by Cuyler, Morgan & Company as I remember, before its maturity. On the 28th day of June Guild & Shepherd [wrotes] us as follows:

"Dear Sir—We were duly favored with your letters of 12th & "13th inst. and had also your cable of the former date. Your "letters were submitted to the directors at their board meeting "on the 26th inst. and they ask us to say that they regret exceedingly that their commitments will necessitate their asking repayment of this loan. We regret that we did not give "you earlier intimation but when you mentioned at the time "you made the loan that you would be able to reinvest we did "not consider that it was actually agreed between us that you "were to reinvest without further communication. On this "point we should perhaps have made matters more clear, and "we regret that we did not so [so]. Our directors ask us to "thank you for your kind offer to relieve them of this loan. "They do not desire to inconvenience you by asking you to relieve them of it at the present time, but they would like that "you should make such arrangements as would enable you to "take it over from us at a date not latter [then] 15th September "next. When you do so take it over, we shall be obliged if you "will kindly place the amount with interest to that date to the "credit of our account with Cuyler, Morgan & Coy. We think "we already explained to you that we hope to be able to lend "further in the Spring of next year, and we shall keep your "claims to a portion of the amount which we then hope to be "able to place before our board." That letter together with the cablegram which I read a few minutes ago, was the first formal acceptance which we had, or rather a formal notification that they expected us to take up the loan; and in
119 June there was no further correspondence on this subject.

We had a great deal of correspondence with Guild & Shepherd which really belonged to other matters. We had a great many letters from them, but these letters I have read constitute the complete history of the negotiations for the repurchase of the loan.

Q. You have all the letters there?

A. Our files show that we have all letters with reference to the repurchase of the loan. We have a great many other letters from Guild & Shepherd, and there may have been casual references to the Gordon loan frequently for a year or more until they were finally paid, but these letters show a complete history of the transaction. On July 21st we wrote Messrs. Guild & Shepherd—this is a letter to them from us on that day —as follows: "In anticipation of the fact that we expect to " take up the loan to John R. Gordon of $50,000, I send you " herewith the note to be endorsed by you to us. In endorsing "the same please endorse it to 'John F. Bell, Trustee,' instead

“ of directly to the company. You might send it back to us “ direct unless there is some objection, and we will hold the “ same and be responsible for it. We hope to be able to take “ up this loan as we proposed promptly on the 15th of Sep- “ tember, but if times continue as they are now we may be “ compelled to ask some further indulgence from your com- “ pany, but will be prepared to give you ample security if you “ desire it. I do not say this in anticipation of the fact that “ we shall do so, but simply because in the present condition “ of affairs here it is absolutely impossible to collect money. “ We are carrying our people and pushing them would simply “ mean ruin to them and greater delay in getting our money. “ We have to-day much over-due paper which we are carrying “ for people and there is no positive certainty when we will be “ able to collect anything again. We have had as you will “ probably see by the papers quite a crash in our banking cir- “ cles here, due almost entirely to the fact that people lost “ their heads and went wild.” Then follows a good deal
120 of discussion as to the condition of affairs, that you may
not want. On the 5th of August, Guild & Shepherd wrote us the following letter: “ Dear Sir—We are in receipt “ of your letter of the 21st ulto enclosing note for $50,000 by “ John R. Gordon to be endorsed by this Company to you. The “ note will be endorsed at the next meeting of the directors to “ be held on Wednesday the 9th inst. and thereafter returned “ to you.” On the 9th of August, Guild & Shepherd wrote us the following letter: “ Dear Sir:—The directors at their meet- “ ing to-day authorized the indorsation of this note to you as “ trustee and we now send same herewith so endorsed. Kindly “ acknowledge receipt of same and hold it for collection.” That is addressed to John F. Bell, Secretary. “ We trust that it “ will not put your company to any great inconvenience to “ make payment of the same on the 15th of next month. We “ think that we already explained to you that our reason for “ asking you to relieve us of this loan was that we close our “ books for the year about then and wish the payment for “ other engagements which we have to meet before the bal- “ ance. We have to acknowledge receipt of your letter of the “ 15th ult. enclosing statement of remittance to Messrs. Cuyler, “ Morgan & Co. which we have examined and found correct.” Those are remittances on different loans. The balance of the letter is about other matters. On August 22nd we wrote Guild & Shepherd as follows: “ Your favor of the 9th inst. received “ along with Gordon note for $50,000. I have also a letter from “ Mr. R. H. Guild, and we will be very much pleased to have “ him spend a few days with us next month.” September 5th Mr. Bell wrote the following letter to Guild & Shepherd: “ I

“am in receipt of your letter of Aug. 21st in which you state
“that your directors have consented to extend the Gordon loan
“for one year from September 15th, at 9 per cent. interest, we
“giving our obligation for the same and placing in the hands
“of your bankers in New York as security, the Gordon note
“for $50,000 and such additional collateral as will be satis-
“factory to you. I must frankly admit that we are extremely
“adverse to paying as high a rate of interest as 9 per cent a year
“and I had hoped that in view of our prompt action in
121 “assuming personally this loan (although we were not
“legally liable for the same), that your directors would
“deal somewhat more liberally with us; still, we would prefer
“to pay 9 per cent for a short time rather than to be forced to
“distress our customers in the present financial condition of
“the country. In view of the high rate of interest, however, we
“wish to have the privilege of paying at the end of any 3
“months, whatever amount we may find convenient with inter-
“est to date, which will then be credited upon the note. We
“think we are fairly entitled to this under all the circum-
“stances. Upon September 15th we will, if possible, make a
“remittance on account, and fix up the balance in the manner
“agreed upon.” We have the following letter of September
22d from Guild & Shepherd: “We have your letter of 5th inst.
“which was submitted to our directors at their meeting on
“Wednesday. They feel highly gratified at the way in which
“you have treated us in this loan and would have been glad
“had it been possible to accept 7 per cent interest. Unfortu-
“nately the crisis which has been felt so keenly by you has not
“been without its effect here, and the fact of our not getting
“payment of this loan and some other loans which we were de-
“pending upon has forced us to sacrifice securities in our hands
“by realizing in the present depressed state of the market, so
“that, in the circumstances, they feel it necessary to ask a
“higher rate of interest. They however fall in willingly with
“your request to have the privilege of [apying] at the end of
“any three months whatever amount you may find convenient
“with the interest to date which will then be credited upon the
“note. We note that on the fifteenth of this month you hope
“to make such a remittance to account which will meet with
“our views. Regretting that we are unable to accept of terms
“which would be more favorable, we remain, yours faithfully,
“Guild & Shepherd,” On September 23rd, we wrote as follows
to Guild & Shepherd: “Referring to your letter of the 21st of
“August in reference to the Gordon loan and to our letter of
“Sept. 5th in reference to the matter, I beg leave to say that we
“to-day send to Cuyler, Morgan & Company a remittance of
“$10,000 on account, with interest on the Gordon loan from
“June 12th to September 12th, and our note for $40,000 payable

"on or before one year. As collateral for said loan, we send "the Gordon note and two other notes amounting to
122 "$11,000, making the collateral held for our loan $61,000. "Instead of dating our loan Sept. 15th we dated it Sept. "12th on account of that being the time when the quarterly interest is due, and I herewith send you a copy of the note as "sent to Cuyler, Morgan & Company." This note I speak of was a year note. We found we could not pay $40,000 on the 15th of September, and had arranged with them to give us another year on our giving our own note as collateral, and that was the loan referred to. "We arranged this matter with Mr. R. H. Guild, who was recently in this city"—Mr. Guild was "over here personally; he is a member of the firm of Guild & "Shepherd—and he was satisfied with the addtional collateral "which we have sent on. You will note further by the copy of "note sent you, that according to our letter, we reserve the "right to pay at the end of any three months, any portion of "this loan. On account of pressure of business we are not able "to send you to-day as complete a statement of this matter and "of other matters as you desire by your letter of Sept. 13th, "which I received this morning, but will do so by the next "mail. Trusting that this matter is arranged satisfactorily to "you I am, very truly yours, John F. Bell, Secretary." I may say here that in the early part of September, I think, if I am correct—it was about the 10th—Mr. Guild of Guild & Shepherd, was on a tour of inspection in this country, and I personally arranged with him—explained to him the condition of affairs and the fact that we were pretty hard up,—to make us a loan for a year of $40,000, upon our paying $10,000; and he examined the collateral and looked at the property that collateral was based on, and agreed to it, and it was in pursuance of that, and we paid this interest to September 12th and gave a note at 12 months, which note was paid shortly afterwards. It did not run for twelve months, but, I think, until January, 1894, when we took it up and paid the balance of $40,000 with interest.

Q. Have you read all the correspondence?

123 A. No, there is another letter. Here it is. John F. Bell, Secretary, received the following letter on Sept. 27th, from Guild & Shepherd:

"We beg to confirm the following cable which we received from you on the 24th inst. (Translation.) Have remitted today to Cuyler, Morgan & Coy, 10,000 on account of the Gordon loan.' On 9th August we sent you out the Gordon note endorsed to you as trustee. We presume you have endorsed on the note the $10,000 paid to account. The interest on this sum and the balance to be paid will be calculated afterwards and we presume [we] do not wish us to take off this sum the interest to date, but as to this perhaps you might write us. We shall be glad to hear from you. Yours faithfully, Guild & Shepherd, Secretaries. We shall also be glad to hear from you as to the lodging of the proposed securities with Messrs. Cuyler, Morgan & Coy. New York."

This note as originally sent to the Investors Company was endorsed simply,—the first endorsement by the International Trust Company. It was returned to us by Cuyler, Morgan & Company without any further endorsement upon it at all. In the month of August it was sent over to Guild & Shepherd and was returned by them endorsed, "Pay John F. Bell, Trustee, for Investors Mortgage Security Company, Limited. Guild & Shepherd Secretaries." After the note was received back, it was then endorsed by Mr. Bell, "Pay the International Trust Company, or order, without recourse. John F. Bell, Trustee." And that was delivered in the latter part of August or first part of September. We have on our Loan Book some entries which I would like to read—

Q. Have you an account showing the transaction with relation to this note?

A. Yes sir.

Q. Have you got that book here?

A. No sir, I sent Mr. Gibson for it a short time ago,
124 and I would like to have that book, because I do not remember the entries upon it.

The Court: Proceed with other matters, and give the book to them.

Q. Now Mr. Hobson, how much, if any, money did Mr. Gordon pay on this loan prior June 12, 1893?

A. Not a dollar, sir.

Q. You may state as to what he paid upon it since that time.

A. Well, some time afterwards, after we had repurchased the loan from Cuyler, Morgan & Company we pressed him a good deal and he paid one installment of interest, $1750.

Q. When was that?

A. From my recollection of it without the book, is that it was the latter part of June 1893; some while after the 12th. I cannot fix the date definitely without the book. I have got the book here now, Mr. Campbell.

Q. State Mr. Hobson, if you have with you now the book of the Trust Company showing the transaction with relation to the note about which you have been testifying.

A. Yes sir.

Q. State what that book is.

A. The book is our record of real estate loans, the book in which we carry our own loans as well as loans of customers.

Defendants object to witness testifying from said book until it has been offered in evidence and they have had an opportunity to examine it and to ask questions about it.

Mr. Campbell: We now offer in evidence so much of this book as shows the transaction with relation to this
125 $50,000, the Gordon note. Marked Exs. "A" and "B".

The Court: You can use it and have your secretary make copies of the entries which you offer and furnish them to the stenographer. The book is not a public record. The counsel will be permitted to examine those entries and those only.

Q. Now just state what that entry shows.
A. The original entry—

Defendants object because immaterial.

Objection overruled.

To which ruling of the Court the defendants duly excepted.

A. —the original entry on the book is on page 42, and sets out the Gordon loan, the amount, and the various items with regard to the loan, which I suppose it is not necessary to read. It sets out the loan as $50,000, interest at 7 per cent., payable semi-annually. Due June 12, 1893. Then follows a description of the real estate. When the loan was sold to the Investors Company there was an entry in red ink, "Transferred to page 375, Loans for Account." On page 375 we carry loans for account in the back part of our book; our own loans in the front part. We entered the name—

Defendants object for the same reasons before mentioned.

Objection overruled.

To which ruling of the Court the defendants duly excepted.

A. —On page 375 is the entry "John R. Gordon, Loan No. 1026." We give the trust deed by Gordon, interest 7 per cent. per annum. Loan, $50,000, account Investors Mortgage Security Company; interest payable semi-annually, $1750. Due June 12, 1893. Insurance $60,000. Then follows a descrip-
126 tion of the lots. Then dated December 12, 1892, is the date of the loan. Those were the original entries upon the book. When this $10,000 was remitted to the Investors Company in September, 1893, I made a personal examination and gave personal instructions about it. I will not say it was the same day, but either the day before or the same day, and I found that Mr. Bell the secretary, instead of transferring the loan back to our personal account had been carrying it along here in this account on this page, and he had made some ad-

ditional entries. At the top of the page is this: "10 per cent from June 12, 1893," which meant that we had notified Gordon that he would have to pay us 10 per cent from that date. We did not pay 10 per cent to the Investors Company. We paid 7 per cent to the Investors Company up to Sept. 12, and 9 per cent after that. He also erases the insurance, "60,000," and put in over it "$50,000," which referred to the fact that I had consented to a reduction of insurance from $60,000 to $50,000. He then had made no entries here and I wrote in pencil—the pencil marks are still in here, "Interest to date;" interest to date based on our repurchase. "The first date is June 12th. Interest $1750. Sept. 12, interest to date based under our repurchase, $875," making $2625. Then "1893. June 12, By cash, $1750. Sept. 15, interest to date based upon repurchase, $2625." I wrote those notes myself.

Q. Were they made before or after the fire?

A. They were made before the fire. I used my pencil, and the marks are still there and the ink is written over them.
The pencil marks are in my own handwriting and were
127 put there to instruct Mr. Bell how to make the entries.
Then follows the following pencil marks by me: "Repurchased from Investors Mortgage Security Company, June 12, 1893, and carried back to page 42, Loan 541." Then written in ink by Mr. Bell is the exact words over my pencil notes. I ascertained that this had been done this way by inadvertence, and I at once instructed him it was wrong, that it had been carried on our books as a loan, and I put these notes to carry it back.

Q. Those were transferred were they?

A. It was transferred back in the following words: "Repurchased from Investors Mortgage Security Company, June 12, 1893." Following that are a lot of interest charges insurance, debit and credit, which we had got from the companies mentioned. I cannot say the date Mr. Campbell.

Q. In other words, those books were not filled up after the fire?

A. I will say this Mr. Campbell, that is my recollection that just as soon as I wrote these notes—Mr. Bell and I were standing at the desk together, and I began there to examine the books and I told him it was wrong to be carrying the loan in this way. I told him to carry it back, and took my pencil and scribbled it, and my recollection is that Mr. Bell took up a pen immediately and wrote these entries, carrying it back to these loans.

Q. Have you stated everything with reference to the accounts?

A. Yes sir, everything in this book shows our accounts.

Q. Now, is that all, or have you got any other books in your office containing the history of this account?

128 A. No sir, that is all; this loan book and the correspondence which I have read.

Q. Now we have in evidence, Mr. Hobson—all the letters and correspondence and the accounts in relation to the loan and the repurchase?

A. That is the complete history of the loan and the repurchase, as shown by the records of our Company

Q. Now prior to the 12th of June, state whether or not there was a meeting of your executive committee with reference to this note?

A. Yes sir: I say a meeting—possibly that is an incorrect term. We frequently determined matters informally, and there had been two—first on the 9th of June, when Mr. Gordon first made a formal application for a renewal, although I had had some intimation that he would want a renewal. At the first time he made the application and he was present, and at that time it was determined that under all the circumstances we repurchase the loan from the Investors Company. On the 12th or 13th of June I again consulted the members of the executive committee and I was authorized by them to repurchase the loan, and made arrangements to borrow the money from the First National Bank, and we actually paid $1750 interest.

Q. Now Mr. Hobson, at what time did your company purchase the note or become liable or become responsible for it to the Scottish Company?

Defendants object.

The Court: I think that is a conclusion Mr. Campbell. He has stated the fact, and this is a question which the Court must determine.

To which ruling the plaintiff duly excepted.

129 Q. Now Mr. Hobson, what, if any, agreement, did your company have prior to the 12th of June, 1893, with the Scottish Company for the repurchase of loans, that you had made with them?

Defendants object. Objection overruled. To which ruling the defendants duly excepted.

A. The contract was an oral contract. Our original arrangement with the Investors Company was made back in the year 1892—

Mr. Smith: We object to his going behind the sale of the note. It is incompetent, immaterial and irrelevant. The note is endorsed without recourse and shows for itself the terms of the sale, and all preceding negotiations are merged therein. The evidence offered tends to contradict and vary the terms of a written agreement.

Witness: That is the time we made the original contract with them about the repurchase of the loans.

The Court: You may state what it was and answer the question.

To which ruling the defendant duly excepted.

[Q.] Mr. Guild, of the firm of Guil & Shepherd, the secretarise of the company, was over here personally and I carried on the negotiations with him personally, looking to the establishment of correspondence with his company. The arrangement made with us was substantially this: they would purchase loans from us whenever they had the money so to do, relying upon our judgment and recommendation, without any investigation whatsoever, in reference to the value of the property, the validity of the loan, &c., and that we, on the other hand, 130 would under all circumstances stand back of them, and any loans that we told them, when they became due, if not paid, that we would take them up if we were not satisfied to renew them. Under that arrangement we were either to write them or wire them as the case might be, if we had a loan of a certain amount, at a certain rate of interest, or giving the date; and they replied; and that arrangement had been kept up to the present time. I do not know as I am justified in saying Mr. Campbell, that that was an agreement that might have been enforced in court; it was an arrangement made with them as correspondents, and we have it with another correspondent in addition to that company, and we have always observed it.

Mr. Smith: We ask to have that testimony stri-ken out.

The Court: I do not think it throws any light upon the question here, Mr. Campbell, at all.

Mr. Smith: The note shows for itself, exactly what the transaction was.

Mr. Campbell: You will notice that this is not any contract made with these parties. Those persons considered themselves morally obligated to this company to repurchase that loan. Then they certainly had an insurable interest, for they had a right to take care of the interests of the stockholders.

Mr. Smith: A moral obligation does not create an insurable interest.

131 Mr. Campbell: Not so far as you are concerned.

The Court: I think it must be a legal obligation.

To which ruling of the court the plaintiff duly excepted.

Witness: I am not willing, if your Honor please, to swear that that was such an agreement as could be enforced in court, and I do not think I would be justified in going that far, but it was an obligation that we always carried out.

Q. Now, Mr. Hobson, I notice that in the letters that you read this morning, the correspondence between your folks and the Scottish Company, something signed by John F. Bell. What official position did Mr. Bell occupy towards the plaintiff in this action, at the time those letters were written?

A. Mr. Bell has been secretary of the Company ever since its organization.

Q. State whether or not he wrote those letters, or dictated them, or who wrote them.

A. The entire correspondence that I read this morning, so far as it relates to the International Trust Company, was dictated by me personally, with the exception which I shall refer to. The letter of May 29th was not dictated by me. It was dictated I suppose by Mr. Bell. It is signed by him. The letter of June 7th was not dictated by me; it was dictated by Mr. Bell. The letter of June 12th was not dictated by me; it was dictated by Mr. Bell.

Q. How about June 13th?

A. The entire correspondence otherwise than that—I should say all the letters of the International Trust Company other than those mentioned, and with the exception of the letter of August 22nd, which was a short letter acknowledging
132 the receipt of the note for $50,000 were dictated by me. I gave personal attention to this correspondence from the time that I found out that they wanted their money.

Q. Now calling your attention Mr. Hobson to the letter of June 13th I notice you use this expression in this letter: "You need not have the least anxiety about this loan or security, for whilst we do not legally guarantee any loans, we always stand back of our correspondents and protect them, and at any time we would rather take up a loan than to have them dissatisfied."
I will ask you to explain what you meant by that sentence.

Defendants object because it shows for itself.

Objection overruled.

To which ruling of the Court the defendants duly excepted.

A. I simply meant this, Mr. Campbell: The letter is a little broad in some of its terms. We never guaranteed the note on its back. We did, as I have heretofore referred to, with some customers—to-day we have two, this company and another, we have made an arrangement with them by which we do not guarantee papers so as to have our obligation standing in the market, but we do take up their loans if desired to, and that is what we refer to here. The letter is a little broad. It does not apply to all of our correspondents, only to some of them.

Q. Now, turning to the letter of September 5th, the letter addressed to Messrs. Guild & Shepherd, I notice in that letter you use the following language—this is the letter as signed by John F. Bell. You say:

133 "I must frankly admit that we are extremely averse to paying as high a rate of interest as 9 per cent. a year and I had hoped that in view of our prompt action in assuming personally this loan (although we were not legally liable for the same), that your directors would deal somewhat more liberally with us."

What do you mean by that?

A. That refers to the same matter. I explained in the testimony that the Court ruled out, that I did not think I could say that the original arrangement we had with Guild & Shepherd—with this company—was a legal obligation, but was a moral obligation, and I referred to the fact that notwithstanding the opinion that I had that we were not legally liable, that we promptly assumed the loan personally, and that in view of those circumstances I thought they would not be pressing us for the balance of the purchase money. I do not consider today that prior to the 12th of June that we had any contract with them that they could have enforced in law, but our company has never dealt with people on that basis, and we did assume the loan promptly when they wished their money.

Q. You may state Mr. Hobson, whether on the 12th of June you paid a visit to Pueblo with reference to this Gordon loan and the insurance upon the Mesa Hotel property.

A. Did you say on the 12th of June?

Q. Yes sir.

A. No sir, not on the 12th of June.

Q. What date was it?

A. I went down on the night of the 13th, and got to Pueblo after dark, on the 14th about 1 o'clock, I think. I was there on the 14th.

134 Q. What did you first do after you got to Pueblo?

A. After breakfast on the morning of the 14th I got Mr. Gordon and Mr. Beaumont and we went over immediately to see the building, and I examined it from top to bottom, and even went on the roof, and climbed out on it, and into the cellar, and I found that the building had progressed very little from the condition in which it had been at the time we made the loan. I do not suppose $2500 had been spent upon it, and after ascertaining its condition I was a good deal disgusted about it, finding that our money had not been spent on it. I immediately went back to town and I arranged to see whether there was any change of title to the building in any way affecting it. I went to the abstract office, and upon my agreeing to order an abstract, which I did, they referred to their books and gave me the information that I wanted about the title.

Q. Now Mr. Hobson, I wish you would examine the record here in the Norwich Union case and turn to the abstract of title, which we will introduce in evidence. Can you turn to that, Mr. Hobson?

A. There are three abstracts here, Mr. Campbell.

Q. We only want to offer in evidence the abstract of title up to the 16th day of June, the part that Mr. Hobson ordered from the abstract office down there. I believe you testified you ordered an abstract?

A. Yes sir, I ordered it on the 14th of June.

Q. And did you afterwards receive an abstract of title?

A. Yes sir, I received the one certificate as of the 16th. We received it a day or two afterwards.

135 Q. Is that the abstract of title in this record of the Norwich Union case?

A. This is the abstract here upon which we made the loan, and certified down to the date of our loan, and the next abstract is an abstract certified as of the 16th day of June, 1893, and this was the abstract I ordered on the 14th of June, 1893, and that abstract constitutes the first two pages and a half of Exhibit 2, and down to the name of "Thomas J. Dowen, Prest. 6-16-93."

Mr. Campbell: Now we offer in evidence so much of this abstract down to the words, "Thomas J. Dowen."

The Court: On what page?

Witness: It is exhibit 1 and part of Exhibit 2; down to the middle of page 3, of Exhibit 2, in the Chancery case?

Said portion is thereupon marked Exhibit 9.

Q. Now in connection with your visit to Pueblo on June 14th, 1893, state whether or not you had an interview with the agent of the Sun Fire Insurance Office?

A. I had an interview with Mr. Henry O. Morris, who issued all of these policies, and who Mr. Piper the State Agent of the Sun Company has told me upon one or two occasions, was their Pueblo agent. Mr. Morris is the man who has countersigned all of these policies and issued them.

Q. Now state what purpose you had in going to see Mr. Morris in relation to this insurance and whether or not you indicated that purpose to Mr. Morris?

A. [O] went to Pueblo to determine whether the International Trust Company would give Mr. Gordon an extension of his loan, to investigate the entire status of affairs with 136 regard to the hotel, to see the building and examine it, and especially to examine with regard to whether the insurance would be carried on the building Mr. Beaumont and Mr. Gordon and I went up into the Opera House Block, stopped right at Mr. Morris' door, Mr. Beaumont went on to his room, and Mr. Gordon and I went into his office. It is a room that I cannot now designate.

Mr. Morris, was in there, at least Mr. Gordon called him Mr. Morris, and he came forward, and I was introduced to him, and I stated to Mr. Morris that Mr. Gordon had applied for an extension of his loan, and that I was down investigating matters for the International Trust Company to determine whether or not we should extend it, or should proceed to foreclose; that the question—one of the important questions connected with the matter was the question whether the insurance would be continued and kept up, and that some of the insurance expired that day, and we wanted to know whether the companies that he represented would renew their insurance. I told him that I had just come from the property, and I remember I got that far when Mr. Morris broke in and said, "Oh, that is all right; I have got the policies all ready for you." Both of these policies expired that day, the Fireman's Fund and the Sun; and I went on then to tell Mr. Morris the condition of the property, and also explained to him that we wanted to know immediately whether they were going to carry the insurance, for, if otherwise, we had arranged with Mr. Sweeney to take the insurance. I may say here that we had to pay Mr. Sweeney 137 double the premium, and that we were not especially anxious to do it. When I got through making that statement to him Mr. Morris again assured me that it was all right; that he knew the condition of the property and I cannot swear whether he took out the policies and tendered them to me or not, but he said that the policies were ready for us. When I had finished that Mr. Morris sent out for Mr. Gordon to come up, and I immediately took out the two policies that I had, one of the Fireman's Fund and one of the Sun, and which expired that day, both of them, and looked at them and commented upon it. Mr. Gordon then spoke up, he being in Mr. Morris' office, and he had gotten me to consent to reduce the insurance from $60,000 to $50,000, and he notified him that he proposed to cut down both of Morris' policies; both of them at that time being $10,000, the Fireman's Fund and the Sun. Mr. Gordon at that time spoke up---he had not said anything before, as I remember---and said that I had consented to let them be cut down, and that he wanted to reduce his policies from $10,000 each to $5,000. Mr. Morris immediately made a very vigorous protest against it; said he did not think it was fair, for Gordon only had $20,000 with him, and he had $40,000 with Benson & Kirtland. And Gordon did not say directly that he intended—that he was also going to cut down Benson & Kirtland. Mr. Morris again made some remarks about the fact. I did not take any part in that conversation. But Gordon insisted on cutting down his policies from $10,000 each to $5,000, and we went out, and Morris says "All right, I will send them up," or words to that effect. I did not get the policies there.

138 Q. Didn't he say at that time that the policies were made out?

A. He said they were ready, yes sir, to that effect. I understood that they were, and that after he had taken the policies for ten thousand each, they had to be changed and cut down to $5,000; and we received the policies then two or three days afterwards, both in the Sun and the Fireman's Fund, for $5,000 each.

Mr. Smith: I move to strike out all of that conversation as to what occurred between Mr. Morris and Mr. Hobson and Mr. Hobson and Mr. Gordon, as immaterial and irrelevant.

The Courts: That is merely preliminary matter. I do not know as it is very material, but it may stand. To which ruling of the Court the defendants duly excepted.

Witness: I was very particular to get both agents to understand the condition of the property at that time, in regard to the stoppage of work, before they issued these policies.

Q. Now, handing you a paper, Mr. Hobson, please state what that is?

A. This is the policy which we received from that office, how, I do not know; I do not remember; we have no correspondence showing this transaction. Frequently these policies were put in the letter and mailed to us. This is dated June 19, 1893, and is for $5,000, in the Sun Company for six months.

Q. State whether or not that is the policy sued on in this action?

A. Yes sir.

Q. Who is that countersigned by?

A. It is signed by Henry O. Morris.

139 Q. State whether or not this is the Henry O. Morris you had the conversation with just detailed.

A. I suppose so. He is the man I talked with. He wrote us these letters.

Mr. Campbell: We will offer in evidence this policy.

Said policy is thereupon marked Exhibit 13.

Q. Who paid the premiums on this policy?
A. The International Trust Company did.
Q. You may state whether or not the plaintiff in this action and Henry O. Morris had any correspondence relative to this policy subsequent to the date it was issued?
A. Yes sir.
Q. Have you that correspondence there?
A. I have here, Mr. Campbell copies of all the letters taken from our letter books. I have not our original letters, but copies of our letters. I will read from the copies and Mr. Smith can follow me to see they are correct. The first letter that we ever had or exchanged with Morris, so far as our records show, was on July 22, 1893. Without my knowledge, as I stated in regard to the North America, Mr. Bell wrote this letter:

"You have issued the following policies upon the Mesa Hotel to J. R. Gordon: Fireman's Fund, $5,000, expiring Dec. 14th, 1893, the Sun Insurance $5,000, expiring Dec. 14th, 1893. I understand that work upon the hotel has stopped and I write to ask whether under the rules of your company this forfeits the policies, and if so, what would be required to keep the same alive. Our interests are identical and I would like to have you give the matter your attention at once. Yours truly, John F. Bell, Secretary."

On July 24th this letter came from Henry O. Morris, or, rather, it was dated July 24th and reached us on the
140 25th of July: "John F. Bell, &c. Your favor of 22nd inst. just received, and in reply will state, that I think there will be no difficulty in securing the consent of companies for work to cease, provided night and day watchmen are kept on duty constantly. Please advise by return mail if this will be done. Also please return Fireman's Fund policy and accept in lieu thereof Underwriter's policy which find enclosed. Confidentially I will inform you that the premiums on this insurance amounting to $150.00 has not been paid, and as money is scarce, I need the amount for remittances to the companies. Can you arrange to have the premium paid? Please do not intimate to Mr. Gordon that I have written you on the subject of money."

I saw that letter on the 25th of July. I paid no attention, especially to the part that refers to the work, except to say that I would see Mr. Gordon, and here is my letter to him:

"Your letter of the 24th duly received and we will write to Mr. Gordon at once about having watchmen placed at the house. In reference to the premium I would say that Mr. Gordon informed us that he had paid you, or rather that he had fixed up the premium. I suppose he meant by that that you had consented to carry him. If you would let us press him on the subject we might be able to have him pay it, but of course as you enjoin us not to mention the matter to him, all we can do is to presume [he] that he has paid it and rest there."

Also on July 26th Mr. Bell wrote a letter saying:

"Dear Sir—As requested in your favor of the 24th, we return herewith Fireman's Fund policy for $5000 on Mesa Hotel for which you have substituted the Underwriter's policy for like amount."

There was an exchange of policies between the Fireman's Fund and the Underwriters. The other letter is as follows:

"July 28th, 1893. Henry W. Hobson, Esq., &c., In reply to yours of the 25th inst. concerning Mr. Gordon's premium will say: That Mr. Gordon has not paid his premium, and I have not consented to carry him as I cannot afford to do so, on account of the stringency of money I am obliged to ask
141 for the premium, and as I have this day sent him a letter to this effect will say, that in case the premium is not paid between now, and say Aug. 5th, I will again write you when you may write him to arrange for it. So until that time the matter can be in abeyance. Very Respectfully yours, Henry O. Morris, general agent."

On July 29th I wrote a letter as follows to Mr. Morris:

"Your letter duly received and when you advise us we will see what we can do with regard to getting payment for your insurance policy. Yours truly Henry W. Hobson, Vice President."

On August 15th Mr. Morris wrote this letter:

"As my collector cannot find Mr. Gordon, and as I am now compelled to at once remit to my companies, I must ask you therefor to please remit me $105, being the amount of premiums due this office."

On August 16th I wrote as follows:

"Your favor of August 15th, duly received, and in reply beg leave to say that we have no money for Mr. Gordon with which to pay his insurance premium. The only way I know of is for you to demand your money of him and in the event of his not paying it, cancel the policies. In this event we have our remedy for if we were to pay this money on our own authority as requested by you, we would simply have an open account with Mr. Gordon and very little chance of getting it paid. I have however written to Mr. Gordon to-day saying that this demand had been made upon us, and demanding that he attend to it at once."

On September 12th Mr. Morris wrote as follows:

"Mr. Gordon has informed me that he cannot pay the premium of $105 due me since June 14th, so I must request the immediate payment of the same, and I have to-day written him to that effect, and notified him that on Saturday, Sept. 16th, I will cancel the insurance for non-payment of premium unless by that date I have the amount of my premium."

On September 14th we wrote Mr. Morris as follows:

142 "We trust you will take no action in regard to the cancellation of Mr. Gordon's insurance until we write you whether we have concluded to advance the premium, which we will do after the return of our Mr. Hobson the first of next week. Please let us know if you will allow it to run until that time."

September 16th I wrote Mr. Morris as follows:

"In reference to the Gordon insurance I would suggest that you let it stand until I go down to Pueblo next week, when some definite arrangements will be made on the subject. I suppose if Mr. Gordon does not pay I will have to do so. It will be a favor to me if you will not cancel the policies as it will necessitate my renewing them up here."

On September 18th Mr. Morris wrote as follows, to me:

"In reply to your favor of the 16th inst., concerning Gordon insurance will say that I will do as you request, and await the result of an interview with you before cancelling policies."

On September 23rd Mr. Morris wrote us as follows: But first it appears that I wrote a letter from Colorado Springs the same as I did in regard to the North America matter, that was signed by Mr. Pierce, the clerk in our office, the letter being as follows:

"I had a plan to go to Pueblo to-day and got as far as Colo. Springs and was detained here. I suppose that we will have to pay the insurance on that Mesa Hotel, and if you will send the International Trust Co. a statement of your account we will give the same attention."

I did not see Mr. Morris when I went to Pueblo. I was a good deal hurried and I went to Benson & Kirtland's office, and I did not see him. He acted on that letter, I suppose. His letter is as follows:

Sept. 23rd, 1893. The International Trust Co., &c. Gentlemen—I enclose you herewith a bill of insurance for $105.00, against Mr. Gordon, covering upon the Mesa Hotel property.

143 As I received a letter from Mr. Henry W. Hobson, from Colorado Springs, saying to send it up to you and it would be paid. Trusting that this will receive your usual prompt attention, I beg to remain, yours, very truly."

On September 26th, he wrote the Trust Company as follows:

"I am awaiting your check for $105.00 in payment of Mesa Hotel ins. as per letter of Mr. Hobson. Resp'y yours, Henry O. Morris."

On September 26th we wrote Mr. Morris:

"Enclosed please find check for $105 in payment of within bill. Please make the receipt so as to show the money is received from the International Trust Company on account of the insurance from John R. Gordon on the Mesa Hotel. I will also call your attention to the fact that in your policy you have the wrong number for the Sun Insurance Policy. The policy that we have is No. 4475189."

On September 27th Mr. Morris wrote me personally as follows:

"Your favor, enclosing check for $105 in payment of the premium upon $10,000 insurance on the Mesa Hotel, property of Mr. J. R. Gordon, is received, and I enclose you herewith receipted bill of same. Thanking you very kindly for your attention to this, I beg to remain very truly yours, Henry O. Morris."

This is the entire correspondence with Mr. Morris up to the date of the fire.

And thereupon all of said letters were offered in evidence and Marked Exhibit 14.

Q. Who paid the premium upon this policy in suit?

A. We did; we paid every dollar of it.

Q. (The Court) Do you mean the International Trust Company?

A. Yes sir, The International Trust Company.

Mr. Campbell: Now we offer in evidence the bill rendered to The International Trust Company by Henry O. Morris for this insurance.

144 Said bill is thereupon marked Exhibit 15.

Q. You say you have the check here?

A. Yes sir.

Q. What is this paper I hand you?

A. It is the check we sent to Mr. Morris, a cashier's check of the Trust Company, which came back and was paid and cancelled.

Q. Is this in payment of the bill we have introduced in evidence?

A. Yes sir.

Plaintiff thereupon offers said check in evidence and the same is marked Exhibit 16.

Q. Do you know whether this property was destroyed by fire, if it was so destroyed?

A. I only know by hear-say. I was in Chicago at the time and got a telegram on the morning of the 10th of October, 1893, informing me that the hotel had, been destroyed.

The Court: Is there any variance between you gentlemen as to the date of the fire?

Mr. Smith: No sir, it was the 9th of October, 1893.

Q. You say you were in Chicago, Mr. Hobson, at the time of the fire?

A. Yes sir.

Q. And you know nothing personally of a notice being given to the company immediately after the fire?

A. I know it from the records of the office, from copies of it in the office, and [acknowledgements] of the receipt of the notice.

Q. Now subsequent to the destruction of this building by fire state what notice, if any, was given to the company that that fire had occurred and the building was destroyed.

A. I have not the notice. I suppose it is in the pos-
145 session of the defendant. It is a letter similar to the
one that was written—

Q. Explain Mr. Hobson, what this is? (Hands to witness).

A. This is the letter I have identified as having been sent by Mr. Bell, our secretary, dated October 12, 1893, and giving notice of the fire.

Q. Have you got any letter acknowledging the receipt of this?

The Court: Is there any dispute, Mr. Smith, that this letter was received by your company?

Mr. Smith: No sir.

Plaintiff thereupon offers said letter in evidence and the same is marked Exhibit 17.

Q. Now, Mr. Hobson, what other notice was served upon the defendant in this action with relation to this fire?

A. On November 2nd or 3rd, I cannot state without seeing the papers—

Q. I believe you said there was some papers served. Just state what this is, Mr. Hobson. (Hands to witness).

A. This is the original of the proof of loss which we served upon the defendant—or, rather, we served it upon Packard & Piper, who, I believe, are the agents—on the 2nd or 3rd of November, I believe. The pleadings state the day.

Mr. Campbell: We offer these proofs of loss in evidence.

And thereupon said paper were marked Exhibit 18.

Q. You say this notice and proofs of loss were served on Packard & Piper?

A. That is my recollection, Mr. Campbell. I have 146 receipts here, and if there is any question about it I will hand them out.

Q. Who was the state agent of the Sun Fire Insurance Office at the time these proofs were served?

A. Mr. Piper told me he was, and he has always conducted the business with me.

The Court: What is the condition of the pleadings? Do you raise the question in your answer as to the fact that these papers were received by you?

Mr. Smith: We do not raise the question that these papers were received.

The Court: I understand, and you contest the sufficiency of it.

Mr. Smith: Yes sir, and we will admit right now, if you want us, that Mr. Piper was the state agent.

The Court: And that these papers were served on him.

Mr. Smith: Yes sir.

Mr. Campbell: Now we will offer these letters in evidence in relation to the Sun Insurance Office, and they may be marked as Exhibit 19.

Said letters were thereupon marked Exhibit 19.

Cross-Examination.

By Milton Smith Esq.:

Q. Mr. Hobson, you testified that the International Trust Company paid interest of $1750 upon the Gordon note which matured, or accrued on the 12th of June. I will ask you if it is not a fact that on or about the 19th of June Mr. Gordon paid that back to you.

A. Some time in the latter part of June, Mr. Smith, Mr. Gordon did pay us back $1750, after we had agreed 147 to let the loan run along, without any definite extension.

Q. That was along about the 19th of June?

A. Yes sir.

Q. The interest from the 12th of June upon the Gordon note, up to the 12th of September, at which time you dated your repurchase from the Scottish Investment Company, the interest was added to the principal as part of the purchase, was it not?

A. I do not exactly understand your question Mr. Smith. We did not date our repurchase from September 12th. We dated our repurchase from June 12th.

Q. On the 12th of September, you stated in your testimony that you calculated interest, because of its being one quarter's interest, and that you paid it from the 12th of June up to the 12th of September, did you not?

A. Yes sir, paid it in cash.

Q. That was the interest which accrued upon this Gordon note.

A. No sir, it was interest upon what we owed to the Investors' Company. We owed them $50,000 from the 12th of June for the repurchase of the Gordon note, and we paid them interest on that amount—seven per cent—up to the 12th of June. We were charging Gordon ten per cent. and when we collected the first insurance money from the Alliance Company we deducted the interest on Gordon's loan up to the date that we got the money, at 10 per cent. They were two entirely separate and distinct matters. The money that we paid to the Scottish Company on September 12th was at 7 per cent. and was on account of our repurchase of the loan on June 12th.

Q. What interest was the note bearing?

148 A. The original Gordon note up to the date of maturity bore 7 per cent. but from the time it was matured we notified Mr. Gordon that we would have to be paid 10 per cent as long as we kept it for him.

Q. You paid, then, the Scottish Investors' Company 7 per cent. interest upon this Gordon note or upon this $50,000, from the 12th of June until the 12th of September?

A. No sir, we paid it on our indebtedness to the Scottish company, and from the 12th of September and under the arrangement with them we gave them our note at 9 per cent.

Q. Didn't you state that you paid the interest on the Gordon note from June 12th to the 12th of September?

A. No sir, I stated that we paid them interest on our indebtedness. They did not own the Gordon note, for we had taken it up, and they had accepted our offer.

Q. You understand that is the question in dispute?

A. We never considered that they owned the Gordon note.

Q. I have not asked what you considered.

A. Or we would have given the full rate of interest on it.

Q. In regard to this interest which you have testified that you paid from the 12th of June until the 12th of September, is what I am asking about?

A. We paid that interest on account of our indebtedness to the Investors' Company, based on our repurchase of the note. We collected interest on the Gordon note from Gordon at 10 per cent.

Q. You did not collect any interest on the Gordon note, did you?

A. We collected it later on, but we were charging it
149 on our books at 10 per cent.

Q. Upon page 375 of your Real Estate Loans, "where you have entered this note, on account of the Investors Mortgage Security Company, you have under date of September 12th. "Interest, $875." That is interest upon what?

A. That is interest upon the amount we owed the Investors' Company from the 12th of June up to the 12th of September.

Q. That is 7 per cent. upon $50,000?

A. Well, I imagine so. Yes sir, I believe it is. That is the amount we owed them.

Q. That is the amount of interest that this note was carrying up until maturity, was it not, at 7 per cent?

A. The Gordon note?

Q Yes sir?

A. Yes sir. That was the amount it drew up to maturity—7 per cent. We could make no loan for the Investors' Company below 7 per cent. They required all their loans to bring 7 per cent that we make. I would like to explain this entry Mr. Smith. Those were entries made by Mr. Bell to square up this account so as to take it off the books in pursuance of my written memoranda written underneath there.

Q. When you received this note on September 12th, for that is the date of this entry at which these charges were made, you received the benefit of the interest on the note from June 12th up to that date, did you not?

A. We did not receive the note on September 12. We received the note originally in the early part of June.

Q. It was September 12th when you balanced this account and made these entries here?

A. We got interest on the Gordon note from June
150 12th up to the present date; that is so far as it has been
paid, from June 12th, 1893.

Q. Referring to this book again, Mr. Hobson, you have the following entries on September 12th, at which this interest is credited and charged. You have the entry "Repurchased from Investors Security Company, Ld. 12 June, 1893, and carried back to page 42, Loan 541." When was the entry made upon this book?

A. I said that so far as the ink entry was concerned I could not swear positively. So far as the pencil entry is concerned, it was made by me, and they followed this identical copy—that was written the day before or the day we sent the $10,000 to the Investors Company. It was in the latter part of September, 1893. I wrote that before I went to Chicago, and my recollection of it is that Mr. Bell immediately took a pen and wrote over it, but the pencil memoranda is in my handwriting and made in the latter part of September, 1893.

Q. This is the first entry you made upon this book with reference to the repurchase, is it not?

A. Yes sir, I did not keep the books.

Q. That any one made?

A. No one so far as I know. My attention was called to it from the fact that I looked at the books at the time I sent the $10,000, and I ordered the loan to be transferred to our account, and it was done.

Q. Referring to page 42 upon which is the original entry of this note immediately under the red ink entry of "Transferred to page 375 Loans for Acct." is the entry "Repurchased of Investors Mortgage Co. Ld. 12 June, 1893." When was that entry made?

151 A. To the best of my recollection it was made at the same time of the ink. You will notice we filled it in pencil from the time it was passed to the other account; so that, to the best of my knowledge, I say that it was made at the same time as that by Mr. Bell; it is in his own handwriting.

Q. The latter part of September, 1893?

A. Yes sir, and the reason I say this is that as soon as the loan was taken out of this account it would have been proper to transfer it to our own account so as to make our general books balance. The entry made here would be taken by a clerk and carried through his journals and day-books, and carried into his statements of the company, and the minute the account goes from the Loans and Accounts to our own accounts it must appear here, and the entries are made at the same time.

Q. So in the due course of business the entry on page 42 was made directly following, or the same time as the entry on page 375.

A. Yes sir, it was made on the same day, or else the books would have been out of balance $50,000, and I do not think our books have been out of balance a cent, to my knowledge.

Q. And this is the first entry upon your books about the repurchase?

A. So far as I know, Mr. Smith. I think—I will say this, that in the entry on page 375 Mr. Bell had been erroneously carrying a large loan there, and he had made certain entries in his handwriting indicating the charge and rate of interest; for instance, 10 per cent. from June, 1893; then changing the interest from $50 to $60. Those were entries made some time
152 from the 12th of June to September, when I made this memorandum here, because that is what called my attention to the fact, those entries that he was mixing up the loan accounts.

Q. What authority, if any, did Cuyler, Morgan & Company have with reference to the extension or purchase of this loan?

A. None at all, that I know of, sir. They are the depositories and custodians of the securities of the Investors' Company, in New York, and they are simply collecting agents.

Q. With reference to any contract for repurchase or extension you corresponded with and received your information direct from Guild & Shepherd, in Scotland?

A. Yes sir; they are secretaries and managers of the companies over there.

Q. Referring to this correspondence regarding the repurchase of the loan, I wish you would state, Mr. Hobson, at what dates, those several letters were received by you, giving the dates on which they were written and the dates on which they were received?

A. The letter of May 26th, from Cuyler, Morgan & Company, according to our stamp mark was received May 29th. The letter of June 2nd—the two letters of June 2nd, from Cuyler, Morgan & Company, one was received June 5th and the other June 7th. One was a registered letter. I suppose.

Q. Did you give the dates of the two respectively, when they were received?

A. Yes sir. Both dated June 2nd, and one received June 5th and the other June 7th. The letter of May 31st, from Guild & Shepherd, has no stamp mark upon it, but I fix the date by two things: one is the letter which I wrote to them the next day, the 13th, and the other is by a letter to John R. Gordon, dated June 13th, in which I speak of having received
153 this letter on the day before, and the correspondence
just introduced shows that we received it on June 12th, the various correspondence in the case. That letter however was received later in the day than the other letters which I shall speak of. The telegram of the 12th from Cuyler, Morgan & Company was received on the 12th. The letter of June 15th from Cuyler, Morgan & Company was received June 19th. The letter of June 14th from Guild & Shepherd was received June 27th. The letter of June 28th, 1893, does not seem to have any stamp mark upon it, but it takes about ten days for a letter to come from them.

Q. What date was that?

A. June 28th.

Q. That would be received when?

A. I should say about 10 days.

Q. About the 8th of July?

A. Yes sir. The telegram of June 26th was received on June 26th.

Q. (Mr. Smith) Who is that from ?

A. This is from Guild & Shepherd. It says: "Have received your letter of 13th June, we will delay until 15th of September" That is the translation. The letter of August 5th, the receipt stamp is so blurred that I can not make it out, but it was about 10 days after that, about the 15th. The letter of August 9th was received August 22nd. The letter of September 22nd was also—I cannot make out the mark, but it would be in about 10 days. The letter of September 27th was received October 9th.

Q. On June 10th, Mr. Hobson, you wrote a letter to Mr. Gordon referring to a meeting of the executive committee for the consideration of the extension of this loan, being Exhibit 18, in the case of the Norwich Union Society. In that
154 letter I will ask you to look at it, if you please, Mr. Hobson—you made the following statement:

"I have been instructed to take up the note held by our correspondent, if desired so to do, and I have accordingly written to advise them of our intentions. The matter has been left open in order to enable you to see what you can do in the premises.

That is part of the letter you wrote?

A. Yes sir; I can explain that if you would like, Mr. Smith.

Q. That had reference to this meeting of the executive committee which you testified to, that was held prior to your going down to Pueblo, was it?

A. It was not a formal meeting. It was a meeting in one sense; that is, Mr. Gordon met the members of our committee; There were several meetings before I went to Pueblo; one was on the 9th, and we held a meeting in Mr. Moffatt's room on the 12th or 13th, I think, but I saw the committee individually.

Q. There was no minute made of this proceeding in regard to the authority to purchase the loan?

A. No sir. We very rarely make minutes of the committee. The members of the committee were consulted to get their judgment, and we generally got their approval.

Q. This note was endorsed by the Scottish Company The Investors' Security Company, to John F. Bell, trustee, for the Investors' Mortgage Security Company, Limited, Signed Guild & Shepherd. What was the date of that endorsement?

A. Well, I cannot say that, Mr. Smith. We sent it to them in July, I think, and it was returned to us some time in August.

Q. Does your correspondence show when that was?

A. The correspondence shows when it was returned to us, yes sir.

155 Q. Can you recall the date?

A. The note was returned on the 9th of August, 1893, from that letter.

Q. It is the date of their letter?

A. It was.

Q. And what time was that received?

A. That was received on August 22nd. They say: "We now send the same so endorsed."

Q. That was for the purpose of Mr. John F. Bell holding that as trustee, was it?

A. It was for the purpose of his holding it as trustee until we paid the money. We had the note in our possession until early in June, and had kept it in our possession unendorsed, and I do not know just what the reason was that we sent it over and had them return it to us endorsed. We expected to take it up in September, and they sent it back endorsed in that way I suppose for Mr. Bell to hold as trustee until we paid the balance of the purchase money.

Q. You received that from Cuyler, Morgan & Company?

A. We received it originally, yes sir, that is in June.

Q. Under their enclosure of June 2nd?

A. Yes sir.

Q. In which they say:

"We enclose herewith under registered cover and seal of our notary, Mr. J. M. French, the under mentioned securities: Note of John R. Gordon, dated Dec. 12, '92, due June 12, 1893, in favor of yourselves for $50,000. With coupon attached due same date for $1,750, together amounting to $51,750, for collection and remittance."

That is the letter of enclosure?

A. That is the letter we got from them.

156 Q. Mr. Hobson, these loss payable clauses and mortgage clauses, which were attached to these various policies, were prepared by the International Trust Company and furnished to the agents, were they not?

A. Yes sir; that is, most of them. There was one of the policies that did not have any, but I think that was the Underwriters.

Q. This policy in suit—?

A. They are both there—the mortgage clause is attached to both of these policies in suit and were furnished by the International Trust Company to the agents.

Q. Mr. Hobson, you had an intimate knowledge of the affairs of the International Trust Company about the time of the making of this loan to Mr. Gordon, and also at the time of the writing of the policies in suit.

A. Yes sir, I suppose I had a more intimate acquaintance with the affairs generally than any officer—that is to say, I had more to do with the direction.

Q. You were a member of the executive committee?

A. Yes sir.

Q. And you were present at all meetings of the executive committee?

A. Well, I cannot say that, Mr. Smith. I was present at most of the meetings. I generally took a pretty active part.

Q. Now Mr. Hobson, I do not quite understand your testimony, or it was not clear to me, in regard to this interest from the 12th of June up to the 12th day of September. You said that you paid interest at 7 per cent upon $50,000.

A. Yes sir, from the 12th of June, when we agreed to take up the—the date at which we agreed to take up—that is anterior; I know we contracted to pay the Investors' Company the same rate of interest that they had been getting—7 per cent
—until the 12th of September, when we wanted some
157 further time, and they then insisted we should pay them
9 per cent, and we paid them 9 per cent from that time.

Q. Then your arrangement for 9 per cent was from the 12th of September?

A. Yes sir. Mr. Guild was over here about the latter part of August, and I made arrangements with him personally.

Q. He is one of the firm of Guild & Shepherd?

A. Yes sir.

Q. Who are the secretaries of this Investors' Company.

A. Yes sir.

Q. And the arrangement with Mr. Guild was that you were to pay $10,000 in cash and give your note for $40,000?

A. No sir, not exactly that; our arrangement with Mr. Guild was that we should have another year to pay the money in, but that he would state the matter to his directors as soon as he went back, and receive their approval. Of course, anything he did was subject to their approval, and we were to give our note for $40,000 paying $10,000 cash, and were to put up a lot of collateral as security for our note. Mr. Guild examined the collateral, and even went and examined the property, that real estate notes were secured on; and we gave our note, and I have the note here.

Q. When did you give the note?

A. The note was given on September 12th, 1893, and was paid on January 5th, 1894, and has the collateral all set out in it. You will notice that it sets out that we obligate ourselves to pay $40,000 one year after date, and then we mention the collateral, that is the loan of John R. Gordon, and a lot of other collateral, &c.

158 Q. Now you held a meeting of your board of directors, do I understand you to say, on the 9th day of June, Mr. Hobson?

A. No sir, we had an informal meeting of our executive committee. Our executive committee is different from our board of directors. Mr. Gordon had some little correspondence a day or two ahead of this—in this chancery case—and he came up and I sent out and got the members of the committee, and they were all within a stone's throw of the office, and we met him and had quite a talk with them.

Q. That is the meeting of which you kept no minutes?

A. No sir, we kept no minutes of a number of meetings of that kind.

Q. How do you fix the time of this meeting as on June 9th?

A. I fix it in this way, Mr. Smith: that I have introduced in evidence in this chancery case a telegram from Mr. Gordon. Mr. Gordon, I would say went and left on the afternoon train to Pueblo. He went down about 2 o'clock and he telegraphed me from Pueblo on the 9th. "Write me action of the board." That refers to the executive committee. "Cannot get up." And I wrote him on the 10th saying, "The matter of the extension of your loan was brought up * * * and fully discussed." Mr. Gordon was at the meeting, however, and stayed some little while himself, and I fix the date of the executive meeting by that.

Q. Did you hold Gordon's note at that time?

A. Do you mean his- ?

Q. His $50,000 note on the 9th of June?

A. I think so; I think we had received it. Yes sir, we received that note on the 7th.

Q. On the 7th of June?

A. Yes sir.

159 Q. You received the note, then as agents of the Investors Company for collection?

A. Yes sir.

Q. And you were informed by Mr. Gordon, at that time that he could not pay the note.

A. Yes sir, and he had written to us. He left a note for me on May 30th at the office. This is on a telegraph blank. He called at the office—in which he says that he called to see me on the hotel matter.

"I had arranged when east, to take up your $50,000 at maturity, but got information yesterday to effect the panicky feeling may prevent getting it for present. I will call again soon, and see you then. * * *"

Then on June 3rd, I wrote him and suggested that he come up and see us in the matter. He telegraphed us on the 6th of June that he would come up. He telegraphed: "Letter received, reach Denver Thursday Information from east unfavorable Please ask extension." That was the first definite information that we had from Mr. Gordon that he wanted the extension. That was the 6th of June, 1893.

Q. Then you had partially arranged for extending that note for Mr. Gordon?

A. No sir, we had not partially arranged, but I had arranged personally that if Mr. Gordon could make satisfactory arrangements we would extend it, and I wrote him in one of these letters telling him that he must be prepared to put up other security. That is the letter of June 10th. I had made up my mind. I say:

"I have been instructed to take up the note held by our correspondent if desired so to do, and I have accordingly written to advise them of our intentions."

Q. You were acting then as the agent of the Investors Company?

160 A. Yes at that time we both understood that they wanted to renew the loan.

Q. And you went to Pueblo to investigate the condition of the building as agent of the Investors Company?

A. No sir, I went to Pueblo after our committee had determined to repurchase the loan, but the Investors Company wanted it paid, and I may say this, Mr. Smith, in explanation, that I had made up mind to repurchase it, for the reason that Mr. Guild was expected over at any time, and I was ashamed to have Mr. Guild go down and see the loan made by us in the condition that it was.

Q. But you had not had any communication from them at that time about repurchasing?

A. Well, they sent the note on for collection; advised us on the 12th of June that they wanted the money paid. The letter was received on the 12th of June stating they wanted to have the money.

Q. You did not receive that until you got back?

A. That was received two days before I went to Pueblo.

Q. When did you go to Pueblo?

A. The night of the 13th. I was in Pueblo on the 14th. Mr. Guild comes over every year and inspects the properties his loans are on, and I made up my mind that he could not see the loan, and that we would take it up. We were very much ashamed of the condition things were in, and I had furthermore made arrangements to borrow the money from the First National Bank to do it.

161 Q. Now what was the conversation with Mr. Henry O. Morris when you were down there at Pueblo, about this "Sun" policy being written?

A. Why, I went in, was introduced to Mr. Morris, and either Mr. Gordon told him that I was the vice-president of the International Trust Company, or I told him when I was introduced, and I knew Mr. Morris was the agent for these policies, and I stated to him that Mr. Gordon had applied to the International Trust Company to renew his loan and that we were considering whether we should renew it or foreclose, and that the matter of insurance was a very important element in regard to what our determination would be.

Q. Mr. Hobson, is it not a fact that you did not have very much conversation with Mr. Morris, that morning, and that most of the conversation occurred at Mr. Kirtland's office?

A. No sir, I did not have as much conversation with Morris as I did with Shepherd. I did not go into any conversation with Mr. Morris about the benefit of the hotel, or about Gordon's financial position, but I told Mr. Morris very clearly that we wanted to know whether the insurance would be carried, and he said the policies were all ready, that the policies would be all right, and I told him about the condition I found the hotel in; that the hotel was standing open and unprotected.

Q. The policies that he had upon the building at that time were each for $10,000 were they not?

A. Yes sir; one in the Sun and one in the Fireman's Fund.

Q. Those policies which he had ready at that time were never received?

A. No sir.

Q. Mr. Gordon was present all the while?

A. Yes sir.

162 Q. And his conversation in regard to these policies being written was directed to you or Mr. Gordon?

A. Whose conversation?

Q. Mr. Morris.

A. The first part of the conversation was with me but as soon as I got through Mr. Gordon then spoke up and said that I had given my consent to cut down the insurance, and he---or words that effect---and he had decided to cut down his insurance with Mr. Morris from $20.000 to $10,000---$5,000 in each company. Then Mr. Morris had a conversation with Gordon about that matter and protested about their being cut down.

Q. But Mr. Gordon insisted on cutting down to $5,000 and they were cut down.

A. Yes sir. We left then and did not take the policies.

Q. Who sent you those policies, Mr. Morris or Mr. Gordon?

A. I cannot state that Mr. Smith. They came to us within a few days afterwards. I cannot state from whom they came.

Q. Do you claim that this is a renewal policy, this Sun policy of insurance which you had?

A. I claim this is a renewal of such other insurance to the amount of $5,000.

Q. To the extent of $5,000?

A. Yes sir; their old policy expired on June 14th, and this was a policy---

Q. Were the attachments to that policy the same as to the old policy?

A. I will examine it. I have the old policy here. They do not seem to be the same. The first clause setting out the description of the property is different, but I call attention to the fact that this occurs in making the loss clause payable to M. D. Thatcher, here on the note, and when this policy was issued, it was afterwards that the mortgage clause was made payable to us.

163 Q. That clause was attached after that policy was written?

A. Yes, I suppose so; in the first instance and then afterwards the mortgage clause.

Q. Well, when was that policy issued?

A. It appears to be written on the 14th of June, 1892. We sent our security clause down, I think, to the best of my recollection, by Mr. Gordon, in the first instance, with instructions to send the policies---

Q. I see the attachment of the mortgage clause on Exhibit 13 is signed by you as having been accepted. When was that done, Mr. Hobson?

A. I cannot tell you that, Mr. Smith. Very frequently mail comes into the office and is put on my desk, just as likely as not a number of insurance policies, and I will take and sign it and other times I might miss it. I have not the slightest recollection when that was done. I suppose it was put on soon after the policy was received.

Q. Now, Mr. Hobson, is it not a fact that you did not expect to pay the premium on this Sun policy until some time in September?

A. Well, I cannot answer, either yes or no, Mr. Smith. I hoped not to have to pay it, and except for the provision in the mortgage clause that if Gordon did not pay it and if demand was made on us we would have to pay it to keep the policy alive---I may say further than that, that at one time I had about concluded to let the insurance drop and reinsure up here through Mr. Sweeney, but I determined afterwards not to do so.

Q. That insurance you were to take with Mr. Sweeney was to cost you more?

164 Q. Mr. Hobson, did you at any time inform Mr. Morris or Mr. Piper, or anybody else connected with the Sun Insurance Office, concerning the sale of this note and securities?

A. Not until after the fire. I informed Mr. Piper and had a very full conversation with him shortly after the fire, and told him the whole circumstances.

Q. Did you have any conversation with Mr. Morris when you were down there in June as to whether or not you were the owners of this loan?

A. Not directly, Mr. Smith, as I stated to Mr. Williams, I spoke to Mr. Morris on behalf of the International Trust Company as the owner of the note and said we were considering whether we would renew it. I don't think I said to Mr. Morris "We are the owners of that note."

Q. Mr. Hobson, I will show you this paper. Is that your signature?

A. That is my signature, Mr. Smith. I imagine that is the paper I signed.

Said paper is thereupon marked Exhibit 22 for identification.

Q. And on this one, Mr. Hobson, that is your signature?

A. Yes sir.

Said paper is thereupon marked Exhibit 23.

Q. Do you identify those two papers, Mr. Hobson, as part of the proofs which you submitted to Mr. Piper? (Hands to witness.)

A. I think so, sir. I submitted some notary's certificates. I think those are the ones.

Said papers are marked Exhibits 24 and 25.

Q. Just one more question Mr. Hobson, in regard to the
terms of the repurchase that you finally agreed upon
165 with Mr. Guild, as I understand?

A. No sir, we never agreed upon terms with Mr. Guild.

Q. Subject to the approval of the Company?

A. No sir, we agreed with Mr. Guild simply upon the Investors' Company giving us 12 months more to pay the balance of the note. Instead of paying September 15th we completed the repurchase at that time, and are liable, but we agreed in substance to pay on September 15th, and my interview with Mr. Guild, and my subsequent correspondence with the company was in relation to paying on September 15th, and the balance due we were to have a year at 9 per cent.

Q. It was with Mr. Guild that you agreed to pay $50,000 and 7 per cent interest, was it not?

A. No sir.

Q. Who was that agreed with?

A. The agreement to pay the $50,000 at 7 per cent, arose out of the fact that the parties demanded their money. We both cabled them and wrote them on June 12th, offering to take the loan ourselves, and they replied accepting it. I knew they would accept it because I knew they wanted the money.

Q. Now did they accept?

A. They replied in June sometime, the cablegram was on June 26th, to that effect.

Q. Is that the correspondence you have introduced in evidence?

A. Yes sir, you have all the correspondence here on the subject. They accepted it and there never was a word said at that time about the interest we were to pay them.

Q. My question is, when was it that you agreed with them to pay them $50,000, with 7 per cent interest from June 12th to September 12th?

166 A. We agreed to pay them at the time we offered to repurchase the note.

Q. When did you do that?

A. We made the proposition on June 12th.

Q. Where is that proposition?

A. It is in our cablegram and letters.

Q. Did you state anywhere that you were to pay $50,000 and 7 per cent?

A. No sir, we agreed to repurchase the loan, and were not going to repurchase it at a discount.

Q. You do not understand the question, or else evade it. I want to know when you agreed to pay them $50,000 with 7 per cent up to September 12th.

A. Mr. Smith, we made the proposition to them on June 12th, which was accepted, that we repurchase that loan. It went without saying that we repurchased it at its face. That was our intention and that is what we did. There never was a word said about the price, but we made the proposition and the proposition carried with it the idea of paying 7 per cent interest that they had been getting before. That is the regular rate all of their loans bear. There never was a word said on the subject, except this correspondence shows— except that they give us until September 15th to pay the principal, we paying part of it on June 12th, and when Mr. Guild was here we explained that the banks had failed—it was after the banks had failed—and it would be a very hard thing for us to pay $50,000 on the 15th of September without forcing somebody into bankruptcy; thereupon Mr. Guild made an agreement with us that subject to the approval of his directors, we were 167 to pay the interest up to the 12th of September and from that time we were to have a year's extension. My recollection is that rate of interest was not discussed with Mr. Guild.

Q. Then the first time you agreed to pay this interest was on the 12th of September—the first time you had any talk about it?

A. No sir, the first time we had any talk or agreement about it was at the time we made the loan. We knew we had to pay interest; they were not going to let the money run without interest.

Q. This note carried 10 per cent. interest, you stated, from maturity, from June 12th?

A. The Gordon note did, but our indebtedness to Guild & Shepherd carried seven per cent. We assumed that was the case, and when we settled up Mr. Guild said we were to pay interest up to the 15th and then on from that time.

Q. When you agreed with Messrs. Guild & Shepherd to accept 7 per cent instead of 10 per cent from the 12th of June to the 12th of September?

A. That was in the latter part of August or the first part of September, when Mr. Guild was here, but I do not think we discussed the rate of interest. Before that time it was assumed that we were not to pay them more than 7 per cent, we having repurchased. The 9 per cent was fixed afterwards, by a letter from Scotland.

Q. The agreement about 9 per cent was afterwards fixed.

A. Yes sir, that was fixed by the Directors of the Investors' Company in Scotland.

168 Q. And then you were advised of it by this correspondence, by the letters you had received?

A. Yes sir, giving the terms of their giving us a year.

Q. Do you mean to say then that you had no conversation with Mr. Guild, or any one else, wherein it was agreed that you were to pay $50,000 with 7 per cent. interest up to the 12th of September?

A. No sir, to the best of my recollection I never had a word with Mr. Guild, or any one else representing that Company, about what the rate of interest up to the 12th of September would be. We assumed that it was acceptable to the Scottish Company that we pay 7 per cent. up to that date, and we did pay it, and for this extension they insisted on 9 per cent.—I explained why they did it, in their letters, that they would have to sacrifice some securities in order to give us that extension.

Q. You charged this interest up at 7 per cent?

A. Up to whom?

Q. On your loan book?

A. No sir, we credited Guild & Shepherd with 7 per cent. and took it out of our cash.

Q. You charged it up on the loan book at 10 per cent.?

A. We charged Mr. Gordon 10 per cent.

Q. That is on page 375?

A. No sir, the charge of 10 per cent. is upon page 42, I think.

Q. Mr. Hobson, I wish you would repeat the conversation as near as you can, the conversation you had with Mr. Guild?

A. Do you mean in August?

169 Q. August or September. You said it was in September?

A. I said the latter part of August or the first of September. I cannot repeat it to you, Mr. Smith, because we had a very extended conversation about all of his loans. Mr. Guild was over here inspecting the properties. He was around to a number of places in this country. We spent probably half a day in talking over the different loans that we made them. On the question of the Gordon loan I can tell you what the substance of it was. I explained to Mr. Guild the condition of affairs, and said to him that we agreed to repay this money on the 15th of September. It was with his firm that we had the correspondence and he knew of it, and gave him the reasons why it would be pretty hard for us to do it; in order to get the money we would have to press our customers, who were not in a condition to be pressed; and discussed the question generally with him. Mr. Guild recognized the force of the views, and, as a result of the conversation we agreed upon a preliminary basis for the extension of the loan for a year. That our loan itself would run with our privilege to repay any part of the loan in a year. We had never given any note for the time, and I do not think that the question of interest was discussed with Mr. Guild at all. The question of interest came up afterwards when they wrote us from Scotland that they insisted on 9 per cent.

Q. Then your obligation was to bear 9 per cent?

A. Our note was to bear 9 per cent; yes sir.

170 Q. Is it not a fact then that you simply remitted without any negotiations whatsoever, and without any understanding or agreement with Mr. Guild, or the Scottish Company—you simply remitting $50,000, with 7 per cent?

A. We never remitted $50,000.

Q. I mean that you charged them with 7 per cent interest at the time you remitted $10,000?

A. After we arranged with Mr. Guild and heard from Scotland, we then remitted the interest to the 12th of Sept., the quarter's interest, and sent on the $10,000, or we may have remitted the interest a little before that, whatever the correspondence shows.

Q. Have you introduced the letter Mr. Hobson, in which you made the remittance of this interest?

A. I think so, sir. This is on September 23rd. This sends the note and the $10,000 together. I suppose Mr. Smith, that was the time we sent the interest.

Q. In this letter of September 27th, which was addressed to J. F. Bell, Guild & Shepherd, they say:

"On the 9th of August we sent you out the Gordon note endorsed to you as trustee. We presume you have endorsed on the note the $10,000 paid to account. The interest on this sum and the balance to be paid will be calculated afterwards and we presume you do not wish us to take off this sum, the interest to date, but as to this, perhaps you might write us. We shall be glad to hear from you."

Now, what did you write to them in regard to that?

A. I do not think we ever wrote them anything on that.

Q. What was done?

A. The loan had been repurchased. You are mistaken about our endorsing on the note the $10,000 paid to account. At that time Cuyler, Morgan & Company had our note for $40,000, with all of this collateral. It was in New York. You simply got mixed up in the matter. 171

Q. Have you this letter of September 27th?

A. I cannot tell you that.

Q. Your files will show it will they not?

A. I suppose so.

Q. I will ask you now if you will not produce the further correspondence on this subject?

A. But you can see this, we had sent some time before that the $40,000 and all of this collateral to Cuyler, Morgan & Company, and they had it in New York, or Guild & Shepherd had it. We could not have endorsed the note.

Q. They distinctly refer in this letter Mr. Hobson, to the calculation of interest and the balance to be paid. As to that they request that you would write them. I request that you bring the correspondence relating to that.

A. As I remember, Mr. Smith, this $10,000 was not paid until September 26th, and we added interest on that from September 12th to September 26th; we paid interest up to September 12th. We paid the $10,000 on September 26th, but we would have to pay interest on the $10,000 during that intermediate time, and that is what they refer to when they speak of endorsing the $10,000 on the note. We could not endorse it; Cuyler, Morgan & Company could endorse it. "Perhaps you might write us." What they meant by that they did not wish to take it out of the $10,000. Interest on $50,000 from September 12th to the 26th, when we paid the $10,000, but wished us to pay the $10,000 on the principal and settle the question of interest afterwards. 172

Mr. Smith: We will ask the witness to produce the further correspondence bearing on this subject.

Mr. Hobson: In this correspondence of Henry O. Morris about the 26th of July, you say: Your letter of 24th of July received, and "we will write Mr. Gordon at once and have a watchman placed at the house." I supposed that meant the hotel.

A. What date is that letter?

Q. July 25th.

A. Yes sir, that is my letter.

Q. Now was there anything ever done in relation to having a watchman placed at the hotel?

A. Not to my knowledge. I spoke to Mr. Gordon about it, Mr. Smith. We were under no obligation to pay that watchman at the house or putting him there. The policy does not demand it and Mr. Morris did not demand it. I spoke to Mr. Gordon and said he ought to put a watchman there, and I spoke to Mr. Gordon several times before that, as early as May when I first discovered it.

Q. When you were in Pueblo on the 22nd of September was there a watchman on the place?

A. I think not, Mr. Smith, I do not think there ever was a watchman on the place after the work stopped, and I repeatedly asked Mr. Gordon to put a watchman there.

Q. You paid this premium on the Sun policy. Did Mr. Gordon ever pay you back for that?

A. Mr. Gordon ever pay us? No sir. We have received some payments on general account of the insurance money collected.

Q. You charged this premium up to Mr. Gordon?

A. Yes sir; that is a condition of our deed of trust. We carried it into the general account.

173 Redirect Examination.

By A. C. Campbell, Esq.

Q. Mr. Smith called your attention to the letter of June 10th. I call your attention to a clause in that letter. I will just ask you to refer to it and explain the matter. You told Mr. Smith you would explain if he desired it, and he did not seem to desire it.

A. I forget which clause it is.

Q. This of June 10th to Mr. J. R. Gordon. It is exhibit 18 in the chancery case. This is the clause: "I have been instructed to take up the note held by our correspondent, if desired so to do, and I have accordingly written to advise them of our intentions."

A. The explanation of that was simply that on the 9th when we had our meeting, or rather, when the members of the executive committee consulted, I explained to the executive committee very fully the condition of the loan and told them that Mr. Guild was coming over at an early date, and I was ashamed to have him know that there was such a loan on our books. I also told them about Cuyler, Morgan & Company's letter, and then they approved of my intentions to buy up that loan so that Mr. Guild should not have a chance to go and see it and jump on us about the condition of it.

Q. Calling your attention Mr. Hobson to the Sun policy, Mr. Smith interrogated you about the difference between the attachments, as he called them, in the policy in controversy, and the one that expired on the 14th of June, 1893. Now in this attachment which is a description of the property, it says lots 8, 9, 10, 11, 12, 13, 14, 15 and 16. I will now ask you 174 whether or not the property as covered by our deed of trust includes all the lots mentioned in this description.

A. No sir, there is a typographical mistake, putting in 8, 9 and 10. The property covered by the Mesa Hotel was on lots 11 to 16, block 126, and that was the property secured by your deed of trust. We never had anything to do with 8, 9 and 10, for the hotel does not cover them.

Q. In the policy of the Sun Company that expired on June 14th, 1893, I will ask you whether or not lots 8 to 10 were included in the description in that policy?

A. Yes sir, but it was a mistake of some kind. The hotel never was on those lots at all; never had anything to do with them; and the deed of trust does not cover it.

Q. I also notice that in the petition in this case, the complaint in this case, on which suit is brought, that the description of the property is mentioned as lots 8 to 12. I will ask you whether that is right.

A. That is a mistake. I suppose it may have occurred in copying the policies. The deed of trust to the International Trust Company only covers from 11 to 16 both inclusive, and those are the lots on which the hotel is situated. We never had anything to do with the others.

John R. Gordon, a witness produced, sworn and examined on behalf of the plaintiff, testified as follows:

Direct Examination.

175 By A. C. Campbell, Esq.

Q. State your name and place of residence?

A. John R. Gordon; Pueblo, Colorado.

Q. State whether or not you were the owner of the property known as the Mesa Hotel property, in Pueblo, Colorado, in December, 1892.

A. Yes sir.

Q. You are the party who negotiated the loan with The International Trust Company?

A. Yes sir; I negotiated with them for the loan.

Q. At the time that this property was destroyed what was the value of the improvements that were upon the property and covered by this policy of insurance of the North America Company and the Sun Fire Insurance Company?

A. At least $100,000.

Defendant object- until it is shown that witness knows the value.

The Court: You can show that he does not know anything about it if you want to.

Mr. Smith: We have an objection on that point of value that we desire to offer. We object to the introduction of any evidence whatever in regard to the value or amount of loss, because the policy provides that that must be determined by an arbitration or appraisement, as a condition precedent, and it is incompetent to prove in this action the value independent of the appraisement, unless it be shown that the appraisement was waived.

The Court: I think your objection will be overruled. I quite agree with Mr. Smith, however, that this man's testimony on that question will be much more valuable if they
176 show he is qualified to testify. To which ruling of the Court the defendant duly excepted.

Q. Who furnished the money that went into this building that was destroyed?

A. The money was furnished by a number of persons, including myself. I furnished a large part of it.

Q. How much money had been expended on this building before it was burned down?

Defendant objects because it is not the way to prove the value of the property.

A. More than $100,000.

Q. More than $100,000 had been expended?

Defendant moves to strike out.

The Court: No, let it stand.

To which ruling of the Court the defendant duly excepted.

Witness here described building and its construction in detail, and testified that he had built quite a number of residence buildings, and had had experience for four or five years in constructing buildings at Pueblo, and had personally supervised the construction of the Mesa Hotel Building. That the value of the building at the time of the fire was $100,000. That there was nothing of value left after the fire. That the condition of the building at the time of the fire was practically the same as in July, 1893.

Henry W. Hobson, recalled for further cross examination, testified as follows:

Cross Examination

177 By Milton Smith, Esq.

Q. Mr. Hobson, did you get those letters that I called for yesterday?

A. I have the letter book here up to December 22, 1893.

Q. When was your final settlement made with the Scottish Company?

A. On January 5th, I think, sir. That was when the note was paid.

Q. This book then, that you have, does not show all.

A. No sir, I have another book here. I have it all he e now, Mr. Smith. The letter which you asked me about was the letter of September 27th, I think.

Q. The last letter was September 27th?

A. Yes sir, and we have no answer to that letter whatever, and the next letter we wrote to Guild & Shepherd upon the subject, on this matter at all, was on October 31st, 1893—there were letters between that time, but there was no reference to this matter, in which we say that we think if we get in some money that we are promised in a few days we may pay them $10,000, &c., if agreeable to them; it is as follows:

"If we get in some money that we are promised during the next thirty days, we may be able to pay you any where from $10,000 to $25,000 upon the $40,000 now due. Upon the terms of our note we are entitled to make payments at the end of every three months, but we would like to do so before that time if agreeable to you. Upon receipt of this please wire simply "Yes" or "No," as you may wish, and if "Yes" notify Messrs. Cuyler, Morgan & Company, New York, to receive payment from us and credit. I do not mean to say now positively that we will be able to make payments but hope so."

The next letter we wrote them on the subject was this of Nov. 25th, 1893:

178 "In accordance with your letter of recent date, proposing to pay something on account of our note to you,

and your telegram agreeing to the same, we have this day remitted to Messrs. Cuyler, Morgan & Company $10,000 to be applied upon our note, and we also remit interest coupons upon the Stewart and Nichols notes, due this month, as per enclosed statement. We hope to be able at an early day to reduce our loan still further." The next letter is December 18th, to Guild & Shepherd, in which we say:

"There is a probability that with a little extra strain, we could pay off the balance of our note with you $30,000, within the next thirty days, and I write to ask whether you would be willing, in case we did so, to let us reloan the amount out here in first class real estate loans, to be subject to your approval. I think under all the circumstances that this would be but fair, and it would be quite an inducement to us to strain a point if this arrangement could be made. Times are looking a great deal better here, and the worst is now over. Please let me hear from you upon this subject at an early day."

Those are all the letters until—here is a letter showing the full settlement, Mr. Williams, if you wish to have that. On January 2, 1894, we wrote Guild & Shepherd as follows:

"In a few days we hope to be able to pay the balance of the $30,000 due you on account of the Gordon loan with interest to date of payment We have already paid, as you know, $20,000, and we will calculate interest on $40,000 from September 12th, to which date we paid interest in full, to the date of the first payment, and on the balance to the date of the last payment. We wrote you recently about reinvesting this money out here and are in hopes that you will consent to do so."

On January 4th we sent this cablegram, to which this is the translation: "Will you accept payment in full note $30,000." You must bear in mind that we had the right on the note to pay it off any three months. We received a cablegram
179 that they would accept, and on January 6th, we wrote as follows to them:

"Yesterday we remitted to Cuyler, Morgan & Company, New York, for your credit $31,632.60 as per enclosed statement. You will notice we have allowed interest on the balance of the $40,000 note to Jan. 9th, We have requested Messrs. Cuyler, Morgan & Co. to return to us the $40,000 note along with, the collateral attached * * * * "

And then the balance refers to other loans. The statement which we sent is as follows:

"The Investors Mortgage Security Company, Limited, in account with The International Trust Company, Denver, Jany. 5, 1894 Badger's interest due 1 Jany., $420; Porter's interest due 1 Jany., $140; (Porter's coupon called for $160 of which we get $20). Balance of our $40,000 note dated 12 Sept. 93, 9 per cent. $30,000. Interest on same to 9th Jany., $1072.60," making $31,632.60. Those other remittances—they included $420 and $140 interest on other loans.

"Above amount remitted Cuyler, Morgan & Co. this day."

That closes the transaction.

Q. After the 27th of September you had no further correspondence or communication with the Scottish Company relative to this matter of interest, which is mentioned in the letter of Sept. 27th.

A. Not at all, sir; never was mentioned except in paying the interest as I have read you in these letters; never was mentioned.

Q. When did you pay the $875 accumulated interest from June 12th to September 12th?

A. My recollection is that we paid it the day we sent the note. I think we credited it up on our books. We carry a running account with the Investors Company.

Q. That was the 24th of September?

180 A. Yes sir; but it was during the month of September. We carry a running account; where we have small amounts we collect and carry to their credit, and occasionally we make a remittance where there is a large amount, to Cuyler, Morgan & Company.

The Court: We went over that matter yesterday, did we not, Mr. Smith? You referred to this eight hundred and some odd dollars from June 12th to September 12th.

Q. We left off with this letter of September 27th in which the Scottish Company write that the "interest on this sum and the balance to be paid would be calculated afterwards and we presume you do not wish us to take off this sum the interest to date, but as to this, perhaps you might write us. We shall be glad to hear from you." That is what I am inquiring about?

A. That refers to the interest from September 12th up to the date when we paid the $10,000, Mr. Smith. The $875 was paid during the month of September. I do not remember just the day.

Mr. Campbell:

Q. Your firm instituted this suit, did it not; filed these suits?

A. Yes sir.

Q. State whether or not the suit was commenced before or after the expiration of the 60 days from the furnishing of proofs of loss in this case?

A. They were furnished more than 60 days; more than 90 days if I remember correctly.

Q. Before the suit was brought?

A. After we furnished the proofs.

Mr. Smith:

Q. I will ask you if it was not within less than 30
181 days after your amended proof of January 16th?

A. We never filed any amended proofs, Mr. Smith.

Mr. Campbell: I object. I asked him nothing about that.

William F. De Camp, a witness produced, sworn and examined on behalf of the plaintiff, testified as follows:

Direct Examination.

By A. C. Campbell, Esq.:

Witness qualified as a master-builder and superintendent of construction, and testified that he had been a boss builder for 18 years; that he made a th-rough examination of the Mesa Hotel building in July, 1893; he then gave in detail the construction of the building and the materials therein.

Q. What would be your estimate of the value of the stone there that was in the building?

A. A total loss.

Mr. Smith: We object to the witness testifying as to the extent of the loss, upon the same ground that we objected to Mr. Gordon yesterday; that the only competent evidence is the appraisement or agreed ascertainment of the loss between the parties.

Objection overruled. To which ruling of the Court the defendant duly excepted.

Witness: That the value of the building at that time, July, 1893, was $130,000 or more; that he saw what was left of the building in December, 1894. That the building was a total loss. The walls and foundations after the fire could not be
used in the erection of another building. The founda-
182 tion might be made to carry a smaller building but it
would cost more to clean it out than it is worth.

A. J. Beaumont, a witness produced, sworn and examined on behalf of the plaintiff, testified as follows:

Direct Examination.

By A. C. Campbell, Esq.

I have resided at Pueblo, Colorado, for fourteen years. Am very well acquainted with the Mesa Hotel property. Its relative contion in July, 1893, was about the same as at the time it was burned. I saw the fire when it first started. Saw the property after the fire. Nothing was left of the building but the scarred burned brick, and even the granite columns were burned down from four feet around to about 18 inches.

Edwin P. Piper, a witness produced, sworn and examined on behalf of the plaintiff, testified as follows:

Direct Examination.

By A. C. Campbell, Esq.

Q. Mr. Piper state your name and place of residence?

A. Edwin P. Piper; residence Denver.

Q. What business are you in?

A. Fire insurance.

Q. Were you in the fire insurance business in June and July, 1893?

A. I was.

Q. State whether or not you were State Agent of the Sun Insurance Office?

A. I was general agent.

Q. Over what States and Territories did your jurisdiction extend for that company?

183 A. Colorado, Wyoming and New Mexico.

Q. Who was the agent of the Sun Fire Insurance Office in Pueblo, Colorado, in June and July, 1893?

A. Henry O. Morris.

Q. Now who furnished him the policies on which he wrote insurance for that company?

A. I think I did.

Q. How were those policies signed?

A. I do not understand your question.

Q. Were they signed by the officers of the company; these blank policies?

A. Supposed to be.

Q. State whether or not Mr. Morris issued policies upon application by simply countersigning the policies and filling them up?

A. He filled up the policies in accordance with the risk which he took, countersigning it and issuing it.

Q. Now what was his authority about accepting risks and issuing policies?

A. The ordinary authority of a local agent.

Q. He was the local agent for Pueblo, was he not?

A. For Pueblo.

Q. The policy would not be referred back to you before he would issue it, or to any other officer of the company?

A. Under some circumstances not; under others it would.

Q. But, generally, that was the practice?

A. There were certain instructions given to him under which he could issue policies without first referring them to me, and under others he referred them to me.

Q. He did issue policies by simply countersigning his name as agent, for the Sun Fire Insurance Office?

A. After he had properly filled up the places in the policies.

184 Cross-Examination Waived.

Mr. Campbell: In the complaint, as to the Sun Fire Insurance policy, we have alleged that this building was upon certain lots [lots] 9 and 10. I ask leave to strike out the words "lots 8, 9 and 10."

Mr. Smith: I think the petition reads from 6 to 11. You had better strike all out.

And thereupon the defendant to sustain the issues on its behalf gave in evidence as follows, that is to say:

Mr. Smith: We now offer under stipulation the abstract of title of this property, it being attached as an Exhibit.

The Court: It is already in evidence down to a certain place on page 3.

Mr. Smith: Yes sir, and we offer the abstract from the point at which it was offered by the plaintiff, down to the end thereof: a complete abstract of the property, that is in both cases.

Mr. Campbell: Now at this point we desire to note an objection to the introduction of that abstract unless it is followed up by evidence showing that we knew of this transfer, in both cases Objection overruled. To which ruling of the Court the plaintiff duly excepted.

Mr. Smith: As a part of our evidence we will read from this
abstract Entry No. 3, showing a conveyance from John R. Gor-
don to the Mesa Hotel & Improvement Company, recorded in
Book 118, page 580. A deed dated July 3, 1893; consideration,
one dollar and other valuable considerations. Filed for
185 record July 3, 1893; acknowledged July 3, 1893, before
Albert L. Murray, a notary public, Pueblo, Colorado.
Conveys lots 11 to 16, block 126, as shown on the original plat
of the former city of South Pueblo, and now a part of the city of
Pueblo, as the same is now on file in the Clerk and Recorder's
office of said county; subject to whatsoever equity or legal
encumbrance are upon the records against said property.

Also Entry No. 4. Mesa Hotel & Improvement Company, No. 65,845. Certificate of Incorporation, dated 14th of June, 1893; filed June 20, 1893. Acknowledged June 14, 1893, before W. F. Townsend, Pueblo, Colorado, under the laws of the State of Colorado, &c. Said abstract is thereupon marked Exhibit 32.

M. V. B. Benson, a witness produced, sworn and examined on behalf of the defendant, The Sun Insurance Office, testified as follows:

Direct Examination.

By Milton Smith, Esq.:

Q. What is your full name, please Mr. Benson?

A. M. V. B. Benson.

Q. What is your age and residence?

A. Fifty-two years; Denver.

Q. What is your business, please?

A. Insurance business.

Q. Mr. Benson, please take this policy, Exhibit 13, with the mortgage clause attached, and state whether or not you are familiar with what is known as the Standard or Union clause?

A. I am.

Q. Are you familiar with the usages of current underwriting regarding the use of the mortgage clause in insurance?

A. Yes sir.

186 Q. I will ask you what is the usage, relative to the use of the mortgage clause, as to the form of the mortgage clause which is used.

Plaintiff objects to what the usage is.

The Court: I think the objection is well taken.

Mr. Smith: If the Court please I offer this testimony for the purpose of showing that the mortgage clause used in this particular case is not the mortgage clause which is used in current underwriting with respect to certain particulars which are material to the issues. That it is a mortgage clause which is prepared by the International Trust Company with respect to those particulars. The evidence offered relates to the construction which is to be placed upon this instrument, as to whether it is to be construed against the Insurance Company as their instrument, or whether it is to be construed against the International Trust Company as their instrument.

The Court: No, I think, Mr. Smith we must take the contract entered into in the case and attempt to find out what it means from its language.

To which ruling of the Court the defendant duly excepted.

H. T. Lamey, a witness produced, sworn and examined on behalf of the defendant, testified as follows:

Direct Examination.

By Milton Smith, Esq.

Q. Mr. Lamey, please state your full name, age and residence.

187 A. Hiram T. Lamey; age 30; residence Denver.

Q. What is your business, Mr. Lamey?

A. Manager for fire insurance companies.

Q. What companies are you manager for?

A. The British America Assurance Company and the Western Assurance Company of Toronto, Canada.

Q. Over what territory does your jurisdiction extend?

A. Over seven States and Territories. Shall I name them?

Q. Yes you can name them.

A. Colorado, Wyoming, New Mexico, Utah, Montana, Kansas and Nebraska.

Q. How long have you been engaged in the insurance business, Mr. Lamey?

A. Fifteen years.

Q. I will ask you if you are familiar with the usages and customs in current underwriting throughout the territory you have named?

A. I am.

Q. I will ask you, Mr. Lamey, if you are familiar with what is known as the Standard or Union Mortgage clause, and its use in underwriting?

A. Yes sir, I am.

Q. I will ask you, Mr. Lamey, to look at Exhibit 37 and please state—

A. It is a standard clause.

Q. I will ask you to state whether or not this is what is known as a Standard mortgage clause or sometimes as a Union mortgage clause?

A. It is the New York Standard.

Q. To what extent, Mr. Lamey, is this mortgage clause used among underwriters?

A. To a very large extent; recently to a much larger extent than formerly.

188 Q. What do you mean by recently?

A. I mean for the last ten years—or five years.

Q. Mr. Lamey, will you look at this mortgage clause attached to Policy, Exhibit 6, the policy in suit? I will ask you—

Mr. Campbell: We have no objection to their going into this matter. Let him put in all the mortgage clauses they wish, but it only encumbers the record.

Q. Will you state, Mr. Lamey, in what respect the mortgage clause attached to that policy differs from the Union mortgage clause?

Mr. Campbell: We object to the witness making a comparison.

Objection sustained. To which ruling of the court the defendant duly excepted.

Q. I will ask you Mr. Lamey, to look at the body of the clause attached to the policy, which is printed solid, in brevier they call that type, do they not—are you acquainted with that style of type?

A. It is about that size, yes sir.

Q. And state whether the provisions printed in that portion of the contract referred to are the provisions of the Standard Mortgage clause?

A. Yes.

Q. I will ask you Mr. Lamey, with reference to the use of the words in the body of the mortgage clause referred to in the Union mortgage clause, the words "mortgagee or trustee"—for what purpose and with what intent are these two words incorporated in the mortgage clause?

189 Plaintiff objects. Objection sustained. To which ruling of the Court defendant duly excepted.

Mr. Smith: Now we will tender the evidence of this witness as to the use of the two words "mortgagee" and "trustee," in connection with each other, to the effect that we offer to prove by the witness that the Standard or Union mortgage clause is used by underwriters in current underwriting throughout a large territory, covering a number of States, in which a variety of forms of securities are used—in some states mortgages, and in others trust deeds; that this mortgage clause is prepared with reference to use in a variety of States and circumstances. That the word "mortgagee" is used in the case of a mortgage, and "trustee" in the case of a trust deed, according to the security which is used, and the other is either superfluous or is erased according to the circumstances and the nature of the securities. That these claims are printed by the insurance companies and distributed among their agents in the various States using these various forms of securities. I offer this testimony because to some extent the two terms "mortgagee" and "trustee" coming in juxtaposition with each other are ambiguous.

The Court: Your offer will be refused, Mr. Smith.

To which ruling of the Court the defendant duly excepted.

190 Q. I will ask you, Mr. Lamey, as to the usage in current underwriting, in case of a trust deed, and a trustee under a trust deed, as to whom the loss is payable?

Plaintiff objected.

The Court: It is sustained upon the ground suggested a moment ago.

Mr. Smith: We will state the object of it. We tender the testimony of this witness to show that current practice in underwriting, with reference to trust deeds, and the "loss payable" clause that where the loss is made payable for the benefit of the holder of the securities, that the loss is made payable to the trustee; that in respect to this policy, the mortgagee clause in question differs from the Union Mortgage clause in current underwriting, in that it is made payable in this case direct to the Trust Company. Of course, the purport of this testimony is to enable us to properly lay before the Court and invoke that rule of law or construction which is invoked so commonly and with so disastrous effects against insurance companies, that the instrument which is of their making is to be construed most strongly against them, and that this instrument, which is out of the way of current underwriting, and prepared by these parties, that it is to be construed most strongly against them.

The Court: They did not prepare this policy.

Mr. Smith: This mortgage clause they did. That is sent by the Trust Company.

191 The Court: I understand that it is accepted by them. But who makes the proposition? It is offered to the International Trust Company, and when they accept it, it becomes the contract of both parties. The offer is denied.

To which ruling of the Court the defendant duly excepted.

Cross-Examination Waived.

Mr. Smith: I likewise offer Exhibit No. 26. It is the proof of loss identified by Mr. Gordon.

Mr. Campbell: We object, as there is no issue here as to Mr. Gordon. We do not contend that he has any interest or can recover on this policy.

Objection overruled. To which ruling of the Court the plaintiff duly excepted.

Mr. Smith: And especially that part beginning with the paragraph as follows:

"Until the 3rd day of July, 1893, the undersigned held in his own name the equity to all of said property so covered and insured by said policy, his right being subject only to the deed of trust in favor of and for the benefit of the International Trust Company, as herein mentioned. On or about the date aforesaid, for good and sufficient reasons, the undersigned organized a company known as the Mesa Hotel and Improvement Company, the capital stock of which was and is practically controlled by the undersigned, upon the organization of which said company the title to said property was transferred to it; said transfer, however, made no real difference in the ownership and title to said property, as the same rights existed with regard to the same after the transfer to the said company as before."

192 Edwin P. Piper, a witness produced, sworn and examined on behalf of the defendant, The Sun Insurance Office, testified as follows:

Direct Examination.

By Milton Smith, Esq.

Q. I understand Mr. Piper that you were the State Agent of the Sun Insurance Office in this State during the years 1892, 1893, and part of 1894?

A. Yes sir.

Q. Who was your local agent at Pueblo, Colorado, during that time?

A. Henry O. Morris.

Q. State to the Court, what authority, if any, Mr. Morris had in the issuing of policies for the Sun Insurance Office?

A. It was what was commonly called the authority of a local agent, conveyed by a written commission issued by the officers of the Company, permitting him to perform certain duties under certain instructions. I cannot give the wording of that commission.

Q. Mr. Piper when did Mr. Morris remit to you, if he did remit to you, the premium for the Sun Insurance policy in question?

Plaintiff objects because immaterial. Objection overruled.

To which ruling of the court the plaintiff duly excepted.

A. I cannot state. I did not know what questions were to be asked me, and I am not provided with that information. It will be a matter of record on the books of the office.

Q. If I should call for the information you could furnish it?

A. Or tell you that I could not, yes sir.

193 Q. Are you acquainted with Mr. Henry O. Morris' handwriting?

A. I am.

Q. Did you, Mr. Piper, or the Sun Insurance Office, have any knowledge of the transfer from Mr. Gordon of this Mesa Hotel property to the Mesa Hotel Company, prior to the fire?

A. Not prior to the fire. I did not.

Q. Did you ever have any knowledge of the sale of the Gordon note by the International Trust Company to the Scottish Company, or to any one else prior to the fire?

A. I did not.

Q. Did you ever have any knowledge of negotiations relating to the purchase or repurchase of this note by The International Trust Company from the Scottish Company, or other persons, prior to the fire?

A. I did not.

Q. Who has been in charge of this investigation relating to the fire and the loss on this hotel, after October 9th? That yourself, or Mr. Morris, or who?

A. I have.

Q. Mr. Piper, I will hand you Exhibit 26, offered in evidence, and ask you if that was received in due course of business in your office?

A. It was.

Q. When?

A. I cannot state from memory, and the stamp on here, which is the record of our office, is a little indistinct.

Q. Just give us your best recollection as to when that was received if you cannot state exactly.

A. I was just looking to see what the document was: I was entirely unfamiliar with it. It is my impression that it was the last of December, but I cannot state positively.

194 Q. Now, did you have any conversation with Mr. Hobson in reference to that document after it was received by you?

A. I did.

Q. State to the Court what it was?

A. I called at the office of the International Trust Company and saw Mr. Hobson, stated to him that we had received a document purporting to be a proof of loss and claim of Mr. John R. Gordon, in reference to the Mesa Hotel claim. I asked Mr. Hobson if it was understood that Mr. Gordon was to make a claim independently of that of The International Trust Company, the papers of which had been previously filed by the Company. Mr. Hobson replied that it was not so intended, that the papers which I presented to him as signed by Mr. Gordon, and following somewhat the form of a proof of loss, were supplementary to those provided by the Trust Company and were made for the purpose of complying with the specific requirements in the condition of the policy, that the assured should make a notice in writing and proof of loss to the Company. That as the policy was written in the name of John R. Gordon, Mr. Gordon being the assured under the policy, they had decided it was necessary that Mr. Gordon should make this written statement to the company, as completing the proofs of loss, which it was the intention of the company to serve upon our Company. That they were supplementary to his documents and a part thereof; that it was not necessary to draw them as an independent claim, for that they became a part of his claim and a part of his proofs of loss to the Company.

Q. Now, Mr. Piper, did you have some correspondence with the International Trust Company in regard to these proofs of loss?

195 Mr. Smith: If the Court please, Mr. Hobson tells me that he lost the letter of January 5, 1894, and that I may introduce a copy of it. I have prepared a copy of it and have had it compared and verified it myself from the letter-book. The original seems to have been lost.

Q. Just examine that paper and see Mr. Piper, if that is a copy of the letter written by you to the Trust Company.

A. I will answer that it is, that it appears to be a copy of the document. I have a letter-press copy at my office of that letter, and if Mr. Smith says that is a copy of that letter I shall be willing to testify to that effect. I wrote such a letter upon that date.

Mr. Campbell: We object to its introduction.

Objection overruled. To which ruling of the Court the plaintiff duly excepted. Marked Exhibit 38.

Q. I will hand you Exhibit 22 and ask you to state what it is?

A. It is the document furnished to the Company by the International Trust Company in completion or in correction and in part—in completion of their alleged proofs of loss.

Q. Was it received in reply to your letter of January 5th?

A. In reply to my letter of January 5th.

Q. When was it received?

A. I cannot give the date. Possibly it bears the stamp of the office; but it was within two or three days, probably on the date which it bears.

Mr. Smith: I want to introduce in evidence Exhibit 22.

196 Plaintiff objects because immaterial and irrelevant, and no exception was taken to the proofs of loss furnished by the Trust Company within 60 days required by the provisions of the policy.

The Court: These papers will be admitted.

To which ruling of the Court the plaintiff duly excepted.

Q. I will hand you Exhibit 23 and ask you what it is.

A. It is a document intended as a correction and amendment of certain alleged proofs of loss which were furnished to several different companies in the matter of the Mesa Hotel claim.

Q. How did you come to receive it?

A. It was received at my office on the 17th day of January, 1894.

Q. Did you receive it in the mail, or otherwise?

A. I cannot say about that.

Mr. Smith: We offer Exhibit 23 in evidence.

Mr. Campbell: We make the same objection.

Objection overruled. To which ruling of the Court the plaintiff duly excepted.

Q. I hand you Exhibits 24 and 25, purporting to be certificates of the magistrates near this building that was destroyed. When did you receive this in your office?

A. I cannot say. They do not bear the receiving stamp and I cannot certify to that.

Q. Well, did you ever see them before?

A. On that I cannot say.

Q. Have you ever seen that letter before that I hand you? (Hands witness Exhibit 39.)

A. I cannot swear to it, but I think I received something possibly of similar purport.

197 Q. Is it addressed to you?

A. Yes sir, addressed to me. I have no recollection of it whatsoever.

Mr. Smith: I will introduce in evidence Exhibits 24, 25 and 39.

Mr. Campbell: We object for the same reasons before stated.

The Court: Yes, they will be admitted.

To which ruling of the court the plaintiff excepted.

Q. Mr. Piper, did you ever have any communication or correspondence other than has been introduced, with the International Trust Company, in regard to these proofs of loss?

A. I do not remember any.

Q. Did you ever have any conversations with the officers of the Trust Company in regard to these proofs of loss other than you have testified to?

A. I think not.

Q. Was there ever any estimate or ascertainment made between the assured, the International Trust Company, or Mr. Gordon, and the Sun Insurance Office, as to the amount of this loss?

A. Not to my knowledge.

Q. Was there ever any appraisal of the loss?

A. Not to my knowledge.

Q. Was there ever any offer on their part to appraise?

A. None whatever.

Q. Did you ever deny any liability of this company, the Sun Insurance Office?

A. I did not.

Q. Prior to the bringing of suit?

A. I did not.

Q. Your efforts were to try and see how the matter stood and to continue the investigations.

A. My efforts were to ascertain whether the liability
198 existed or not, to what extent, and I covered every point of information which appeared to lead in that direction, in my requisitions for information to that end.

Q. Did you make a tender to the International Trust Company of the premium which had been paid?

A. I think I did.

Q. And of the cost which had accrued?

A. Yes sir.

Q. I hand you Exhibit 40. See if that is your signature?

A. It is.

Mr. Campbell: We have no objection to that paper dated February 21, 1894, Exhibit 40.

Mr. Smith: It is only introduced to show the tender.

Mr. Campbell: We will admit that.

Said Exhibit 40 is thereupon introduced in evidence.

Q. Mr. Piper, did Mr. Morris as representative of the Sun Insurance Office have authority to take insurance otherwise than as would appear from the contracts of policies?

A. Certainly not.

Q. He had no authority to make contracts of insurance without a policy?

A. Only as represented immediately by a policy, and subject to the Company's approval.

Cross Examination.

By A. C. Campbell, Esq.

Q. What date did you say you called upon Mr. Hobson at his office with The International Trust Company?

A. I cannot state the date. I do not know that there is any record of it.

199 Recess until 2 p. m.

Q. (Mr. Smith): Mr. Piper did you have another conversation with Mr. Hobson about these matters other than what you testified to?

A. I think I had a second interview with Mr. Hobson in response to a telephone, and it related to furnishing plans and specifications of the building. The International Trust Company in response to my demand had endeavored to furnish plans and specifications. Mr. Hobson telephoned, asking me to call at his office, which I did, and he went into some explanation as to the difficulty of getting them. We had a little conversation relating to the character of the building and the difficulty of obtaining plans and specifications, and the loss of part of them by The International Trust Company, or their inability to obtain them; but I think that I had two interviews concerning this matter.

By Mr. Campbell:

Q. Now have you produced all the papers here that Mr. Hobson served upon you after January 5, 1894?

A. I have not produced any papers.

Q. Well, were all the papers produced by your counsel here to you to be identified—were those all the papers Mr. Hobson served on you after January 5, 1894?

A. I cannot say as to that.

Q. Didn't he serve other papers after that time?

A. I would not like to testify in that matter without going carefully over those. May I be permitted to say in explanation of any testimony that I may give, that some time ago my connection with the Company ceased and all records which I had were turned over to the Company, or, in this case, to the
200 attorneys. Since that time I have not been in position to tell, and not knowing that I would be called upon as a witness in this matter, or that the matter would even get into court, my testimony is a matter of recollection, and it is very indistinct as to that.

Q. Did not Mr. Hobson furnish you with everything that you called for?

A. No; he did not.

Q. Do you remember receiving a letter on January 12, 1894?

A. If the letter was produced I would be able to refresh my memory in the matter, but I have no recollection of the dates of the different transactions. They were all a matter of documents or of record ordinarily.

Q. I will ask you if you received a letter from Mr. Hobson, dated January 12, 1894?

A. It is very probable that I did, although I have no distinct recollection in the matter.

Q. Don't you remember Mr. Hobson's bringing you a letter on January 12, 1894, and handing it to you in the presence of Mr. Gibson?

A. I do not recollect the presence of Mr. Gibson. I know that I received several communications from the International Trust Company, or Mr. Gordon, at several times, containing papers supplementing his first claim, and giving additional information.

Q. Now, didn't you on that occasion of his handing you this letter, say in reply to his question, "Now, is this everything you want?"—and didn't you say in reply to that, "Yes, I think you have furnished everything now?"

A. No, because there was very important information
201 which I had called for, and it was necessary for us to have it in order to determine whether the claim was a just one, and what that claim was—which has never been furnished.

Q. Then you didn't say to Mr. Hobson, on January 12, 1894, in your office, in the presence of Mr. Gibson, in reply to his question, that you were satisfied with everything now that had been furnished, and that that was all that was necessary?

A. No sir, I certainly did not, because we never have been satisfied.

Q. Didn't you on January 12 receive from Mr. Hobson, first, a detailed statement on the part of the Company under oath?

A. I received certain documents; I do not know from that description what documents you refer to.

Q. Didn't you also get an affidavit, accompanying the papers of W. F. De Camp, at that time? Didn't you get that paper from Mr. Hobson?

A. I received a statement from Mr. De Camp.

Q. Didn't you receive it from Mr. Hobson?

A. Why, I presume so, but it was a statement of Mr. De Camp.

Q. Didn't you also receive the affidavit of William Lang, at that same time?

A. I think there was a statement of William Lang, architect.

Q. Didn't you also receive the statement of John R. Gordon at that time?

A. If it was stated to be enclosed with those papers, I presume I did.

Q. Didn't you also receive a copy of the specifications of the Mesa hotel marked Exhibit B?

A. That is probably a matter of record.

202 Q. Didn't you also receive a copy of the brick-work specifications marked Exhibit D, from Mr. Hobson, on that occasion?

A. I do not recollect.

Q. Didn't you also receive from him a roll of plans, marked Exhibit A to H, containing 19 sheets of blue-prints, at that time?

A. I received a roll of blue prints.

Q. At that time?

A. I could say whether at that time or subsequently.

Q. Did you also receive plans, containing four sheets, marked Exhibits — to —?

A. I do not recollect. I received quite a number of sheets of plans. Those were all turned over to the attorneys with the other papers in the case.

Mr. Campbell: Now we ask the defendant's counsel in this case to produce the documents which you say were delivered to this agent on January 12, and which they have not produced here. We will also offer in evidence the letter of January 12th, from Mr. Hobson to Mr. Piper.

Said paper is marked Exhibit 41.

Mr. Smith: We have here Exhibit D, as you style it, and Exhibit B, the affidavit of De Camp, the affidavit of Land, and the affidavit of Gordon. We have no blue-prints. I do not know where they are. I do not imagine that they are material.

Mr. Smith: Of course, we do not admit anything that is in them, but they are all that were furnished.

203 Mr. Campbell: We will offer those papers handed to us by Mr. Smith, in evidence.

Mr. Smith: I object to them as immaterial, improper, incompetent, and not the best proof of the facts they contain.

Said objection is overruled. To which ruling of the court the defendant duly excepted. And thereupon said papers are received in evidence and marked Exhibit 42.

Q. Mr. Piper, did you ever demand an appraisal of this property?

A. No.

Q. Did you ever say anything to Mr. Hobson, or to any representative of the International Trust Company, that you wanted an appraisement of the property?

A. I think not. We were not ready for the appraiser—

Q. Do you know whether any representative of your company, the Sun Insurance Office, made any demand for an appraisement?

A. I do not know that they did.

Q. If that was a fact you would know?

A. I would be likely to.

Q. Now, had you not, Mr. Piper, denied the liability of the Company under this policy in the same way that it is set up in the answer in this case, on the defense—deny it on the ground that there was an increase of hazard, and deny it on the ground that there was a change in the title to the property without your knowledge or consent, and also deny the legality of it on the ground that the International Trust Company was not the owner of the note and trust deed?

204 A. I do not know of anything in my communication to the International Trust Company that is in the nature of such a denial.

Q. Didn't you in conversation with Mr. Hobson, say to him, in substance that your company was not liable; first, because of the increase in hazard; second, because of the change of title; and third, because they were not the owner of this note of $50,000 and the trust deed?

A. No.

Q. You never did?

A. I want to say right here in explanation, with the permission of the court, that previous to any communication to my company from the International Trust Company I called upon Mr. Hobson to ascertain if the Alliance Insurance Company was involved in this loss to the amount of $20,000. I was the local agent here, or the firm of which I was a member, was the local agent of the Alliance Insurance Company. Mr. Hobson understood I was there to discuss the business of the Alliance Insurance Company claim, and we went quite completely over the facts in the case, discussing them as between ourselves, without any prejudice to the matter in any way; and when I had finished the conversation Mr. Hobson wanted to know what I was going to do, or something, and I said that I in no way represented the Sun Insurance Company, that I was simply there to ascertain if they were involved in the matter to the extent of $20,000. His reply was, "I suppose you are here as the representative of the Sun." I said certainly not, that I had nothing to do with their case.

Q. (Mr. Smith) The 'Sun' what?

205 A. The Sun Insurance Company. Subsequently when we were discussing the claim of the Sun Insurance Company, I was guarded in what I said and neither admitted

nor denied liability nor discussed the case beyond inquiry for information which would lead us to determine our liability.

Q. You made a tender of the amount of the premium, did you not?

A. Yes sir.

Q. Did you mean by that to say that you were or were not liable under this policy?

A. What does my document say, my letter? My tender was made in writing. I would rather refer to that.

Q. Do you mean to say that when you made that tender that you were liable or not under the policy?

Mr. Smith: I object to that because it calls for a conclusion.

The Court: We will determine what is meant from his letter.

Q. Then, Mr. Piper, you had discussed with Mr. Hobson this Alliance policy?

A. I did.

Q. Did you not know prior to the bringing of this suit and prior to the furnishing of that second information from Mr. Hobson in relation to that Alliance policy, that they did claim anything under that policy, that Alliance policy for $10,000?

A. I cannot say the date of the interview or the date of my obtaining the information. Mr. Hobson stated to me that he had compromised his claim against the Alliance Insurance Company for a certain sum of money; whether that involved one policy or two he did not say, or at least he perhaps did not know. I could not say.

Q. Now you say that Mr. Hobson told you that he had compromised with the Alliance Company.

206 A. That he had made a compromise settlement with the Alliance Company.

Q. Did he use the term "compromise"?

A. I do not know whether he did or not. I use it.

Q. Didn't he say that he had settled with the Alliance Company?

A. I presume he may have used the term "settle".

Q. Don't you know as a matter of fact, prior to the 5th of January, 1894, that the International Trust Company made no claim whatever under this $10,000 Alliance policy?

A. I say I cannot say whether that interview was before January 5th or not.

Q. Didn't you discuss the matter with Mr. Mills who was out here to adjust for the Company?

A. I did.

Q. Didn't you in that discussion and was it not understood between you that that claim under the second Alliance policy had been abandoned?

A. No sir, I did not know it at all.

Q. Didn't you know all the facts with reference to the second Alliance policy?

A. I knew some of them.

Q. You did know that the second policy had not been delivered?

A. It was reported so.

Q. Did you know of your own knowledge? Were you the local agent of the Alliance Company at that time?

A. I was the local agent.

Q. At the time of the fire?

A. I think so.

Q. Didn't you know as local agent that the policy was not delivered?

A. No sir, I did not. It was written in Pueblo and did not relate to my agency.

207 Q. Was not the matter discussed?

A. It was in Pueblo.

Q. Was it not discussed in your presence?

A. In Pueblo, yes sir.

Q. And by Mr. Niles in your presence?

A. Yes sir.

Q. And didn't you know from that discussion that the policy had not been delivered, immediately after the fire?

A. Mr. Niles told me that the Company was in for $20,000, and it was not until after he had left the city, representing that he was interested to the extent of $20,000, that I learned that he had made a compromise settlement, or overtures to that effect, and his statement was made in the face of our understanding with Mr. Hobson that he was involved for $20,000. We supposed until my interview with Mr. Hobson that he was not involved.

Q. And you understood from Mr. Hobson that he was not liable?

A. I understood there had been a compromise in the sum of $20,000; either 50 per cent on the two policies or the full settlement of one.

Re-direct Examination.

By Milton Smith, Esq.

Q. You do not know when that conversation was?

A. I can not say the day, but it was while the papers of settlement of the Alliance Company were on Mr. Hobson's desk. He had received the proposition from the Alliance Company, and the unfinished papers were on his desk.

Q. I understood you to say you did not discuss anything about the Sun Insurance Office in that conversation.

A. No allusion to the Sun whatever.

208 Mr. Campbell: Why not offer the other letters to complete the correspondence?

Mr. Smith: We now offer Exhibits 43, 44, 45 and 46 in evidence.

Said Exhibits were thereupon received in evidence without objection, and marked as above mentioned.

Defendants rest.

And thereupon the plaintiff to further maintain the issues on its behalf, gave in rebuttal as follows:

Frank B. Gibson, a witness recalled on behalf of the plaintiff testified as follows:

Direct Examination.

By A. C. Campbell, Esq.

Q. I believe that you stated that you were cashier and assistant secretary of the International Trust Company?

A. I did, yes sir.

Q. And were such officer from July, 1893, until October, 1893, or during that period?

A. Yes sir.

Q. What knowledge if any, did you have, as an officer of that Company, or otherwise, as to the transfer of the Mesa Hotel property from John R. Gordon to the Mesa Hotel Company?

A. I had no knowledge whatever of it, or any intimation of it, until after the fire.

Q. Now Mr. Gibson you may state whether or not you were at the office of Mr. Piper, the witness who left the stand, on the 12th of January, 1894, in the presence of Mr. Hobson.

209 A. I was there, I think. The date was the 13th however.

Q. What did Mr. Piper say there with reference to being satisfied with the proofs of loss and the papers that had been furnished him by Mr. Hobson?

A. Mr. Hobson offered him certain papers, and Mr. Piper said that he thought those would be all that were necessary; that he would look them over and if anything further was needed he would let him know.

Cross Examination.

By Milton Smith, Esq.

Q. He did not pretend to pass on the proofs at that time, did he?

A. No sir.

Henry W. Hobson, a witness recalled on behalf of the plaintiff, testified as follows:

Direct Examination.

By A. C. Campbell, Esq.

Q. Mr. Hobson, I believe you stated that you were the vice-president of the International Trust Company during the year 1893?

A. Yes sir.

Q. What knowledge if any, did you have as to the transfer of the Mesa Hotel property at Pueblo, Colorado, from John R. Gordon to the Mesa Hotel Company, until after the fire?

A. The first I ever heard of the transfer was a telegram that I received on the morning of the 10th of October, 1893, in Chicago; and so far from having any knowledge of it, the
transfer was made in the face of a direct prohibition by
210 me, against having any transfer.

Q. If any officer of the Trust Company had any knowledge of the transfer prior to the fire, state whether or not you would have known it?

A. I certainly would. I was the principal executive officer of the company at that time. Mr. Moffat was nominally president of the Company, but took no part in the management of the business. Reports were made to me every day concerning the business of the Company and I kept up very closely to it at that time. There never was any knowledge on the part of our company that any transfer was made, until after the fire.

Q. Well, Mr. Piper testifies with reference to his calling upon your office relative to the Gordon matter. I will ask you what occurred there at that time in reference to that matter?

A. I had two interviews with Mr. Piper at my office. He is mistaken in saying that I had only one. Both interviews were quite lengthy, and Mr. Piper called upon me as the representative of the Alliance Company and the Sun Company. At that time his firm were the agents of both companies. Mr. Piper's statement of the interview is not correct as to Mr. Gordon's proof. It is partially correct. He called upon me in the early part of December, just after Mr. Gordon's proof had been furnished him, and showed them to me, and asked me about them, whether I knew anything about it. I stated to him that I had nothing to do with Mr. Gordon's proofs; that I had refused to have anything to do with them and had
told him to get another lawyer; that I had suggested
211 to Mr. Gordon that he should make proof in addition
to the Trust Company, so as to supplement it. He then asked me if he was to understand from that that there were to be two claims asserted against the insurance companies.

I told him that I did not so understand; that I understood there could be only one claim under the policy, for the sum of five or ten thousand dollars, as the case might be, but that I did not understand that double proofs were furnished with a view of asserting two separate claims, and that so far as we were concerned we had nothing to do with the Gordon matter and had even refused to have anything to do with the preparation of his proofs, and that we stood on our own bottom, and proposed to assert our claim, and I re-asserted that matter in the letter of January 12th, which has been filed here. We never acted for Gordon and we made our proofs for ourselves. As for saying that we had admitted that Gordon's proofs might be part of ours, that is untrue and ridiculous.

Q. Also state if you said that these proofs were furnished only to comply with the conditions of the policy?

A. No sir, I did not. I stated that I had suggested to Mr. Gordon that it might be well for him to file proofs, but we refused utterly to have anything to do with them, and did not care whether he filed them or not.

Q. What conversation, if any, did you have with Mr. Piper with relation to their liability on this policy that is sued for?

A. I had two conversations with Mr. Piper upon the subject of their liability one was within a short time after our proofs were furnished them in
212 November, and the other was in December. In neither
of these conversations did Mr. Piper assert positively that they would not pay the policies. But Mr. Piper in both conversations asserted very, positively and clearly the grounds and defences upon which his companies were not liable. He went into the discussion of them with me, and in one conversation, or a conversation of over an hour, in which he was speaking for both the Alliance and the Sun Company, and in which he brought up and discussed with me the facts with regard to the entire matter: First, change of hazard; second, change in ownership of the property; and third, the ownership of our note so far as property was concerned. Mr. Piper intimated that they were prepared to prove that Mr. Thatcher, the trustee, had notice of the transfer, and we had not notified him. But very clearly and very positively Mr. Piper set up these defenses and left me to understand that if they paid at all it would be a matter of grace. And I wish to say further in that connection, that after the 60 days had expired from the time we furnished our proofs I would have brought suit immediately on the policies but for the fact that Mr. Packard who was Mr. Piper's partner, came to see me and also agents of one or two other companies, and asked me not to bring suit, as they thought the companies would pay after a while, but leaving it

always as a matter of grace; and always Mr. Piper, and every other agent of all these insurance companies who saw me, asserted to me that the companies were not liable legally, but it was simply a question whether they would determine after looking into the question, whether they would pay it, as
213 a favor or in consideration of our equities.

Q. Now you can state whether or not you were in the office of Mr. Piper on the 13th of January, 1894, in the presence of Mr. Gibson.

A. I was.

Q. What occurred there in relation to the furnishing of additional proofs or as to Mr Piper's being satisfied with what had already been furnished?

A. I have a memorandum here, Mr. Campbell, which was made at our office, the Trust Company office, as soon as I went back, by Mr. Gibson and myself jointly, and I can state generally what occurred, but I would like to refer to this memorandum. I went in with Mr. Gibson and presented this letter of the 13th, and I took out one by one, the papers referred to in this letter and handed them to Mr. Piper and had him open them and look at them, although he did not examine them critically or carefully. I explained to Mr Piper what they were, and when I got through I said to Mr. Piper that we had furnished him everything that he had called for, and we had gone to a great deal of trouble and expense in doing it, and we hoped that it was satisfactory. Mr. Piper, said, of course, that they would not put us to any unnecessary trouble or expense. Then I explained to him the blue-prints and rolls, some 25 sheets altogether of it, and showing the plans of the building; and I may say that I had given him those blue-prints several days before that to examine in anticipation of this interview. I then asked him if he had examined those blue-prints and plans, and he said he had examined them. I asked him
214 if they were satisfactory, and he said he thought that they were, that he did not want the full working but only sufficient plans to show them the character of the building, so they could determine the amount. I then asked Mr. Piper—spoke of a set of plans which had been at the building and which had disappeared, and which I learned that Mr. McSwain had stolen. I spoke of them and asked him if he had seen those plans. He smiled and evaded the question, and I said to him, "Mr. Piper didn't you have those plans in your possession all that time?" They put us to the trouble to get those plans in addition.

Objected to as immaterial.

Witness: Well, the substance of it was that he had the plans at the time he demanded plans from us.

Mr. Smith: I move to strike that out.

Q. Certain papers have been introduced in evidence here in each case.

A. With reference to my conversation with Mr. Piper about the liability I also wish to say that I discussed with Mr. Piper fully and personally the facts with regard to this Alliance policy. At that time I discussed it with him I did assert liability on the policy, and Mr. Piper was as fully aware of the fact as I was or any other agent, when I discussed it with him.

Mr. Smith: I move to strike that out.

Q. You say he was aware of it?

A. He explained it.

Q. There has been testimony introduced here on the part of the defendants in each case, what they term addi-
215 tional proofs or amended proofs of loss. I believe they
were furnished by you on the 16th of January in each case. Just state how you came to make those additional proofs?

A. I did it entirely voluntarily. Mr. Piper and other agents of the insurance companies knew at the time that the Alliance paid up their policy. We made a compromise, on which they paid us in full on one policy, and the second policy I abandoned because I then thought that we had no legal claim against them; and Mr. Piper, I talked with him, as he says, and I had the papers on my desk some two weeks before we got the money, and I spoke of it. The papers which were sent on the 16th of January were purely voluntary, and I suppose I did it out of my desire not to have a sworn statement standing out, sworn to by Mr. Gibson, the assistant secretary of the Company, uncorrected; and it was not intended in any sense except for that purpose. That is we did not want it to appear of record that we had a statement outstanding that was not correct.

Q. Mr. Hobson, did either of these insurance companies, the defendants in these actions, ever make any demand for appraisal of the property?

A. Not one, no sir. Nobody ever made any demand for an appraisement.

Cross Examination.

By Milton Smith, Esq.

Q. Mr. Hobson, did The International Trust Company ever make any demand for an arbitration?

A. It did not, sir. It was not our business.

216 Q. Mr. Hobson, you say that you had no arrange-
ment whatever with Mr. Gordon in regard to paying the premiums? Had you, on these policies?

A. Yes sir. I do not say that we never had any conversation with Mr. Gordon about it.

Q. I will ask you whether on September 13th, Mr. Gordon did not write you giving you a statement in regard to these premiums, from both Morris, and Benson & Kirtland, asking you to pay for them, in which he says: "I dislike to ask you to advance this amount but I do not see any other way at present. If you will send the amount to Mr. Beaumont to settle with the parties, it will be a great favor and I will not incur any more obligations without consultation with you before-hand."

Did you receive that letter from Mr. Gordon?

A. Yes sir.

Q. And that was before you paid the premium?

A. Yes sir, and we had received a demand before from the companies, the agents, that we should pay it too.

Q. That was after you received this letter from Mr. Gordon? His letter is dated the 13th.

A. It may have been. Yes, it was after that. Let me read the letter please. Mr. Gordon in this letter says as follows: "I just received a letter from Mr. Morris stating that unless paid this week he would have to cancel. Mr. Kirtland has told me me about the same thing." He then asked me to pay.

Q. Mr. Hobson you say you had two conversations with Mr. Piper. When was the first one?

A. Not a great while after our proofs of loss were furnished, Mr. Smith.

Q. Was it after the proofs were furnished, the first
217 one?

A. Yes sir; about November 2nd or 3rd, whenever it was.

Q. Now at that conversation didn't you say that you and Mr. Piper discussed what the defense would be in case it came to trial?

A. No sir, not in case it came to trial. Mr. Piper asserted the grounds upon which his companies were not liable legally, and we had quite a discussion on the subject.

Q. Was not that discussion, Mr. Hobson, had with the definite understanding between you and Mr. Piper that you were discussing those facts without any question as to its affecting the decision of the company which was to be made thereafter?

A. It was in a measure, Mr. Smith. Mr. Piper at all times tried to lead me to believe and also intimated to me that notwithstanding the legal defenses, the company might have and their lack of legal liability, that they might decide at some future day to pay the account as a matter of grace.

Q Then he did not positively say to you at any time that they were or were not liable?

A. He never said—that is, he never said "we will not pay," but he did set up in the two conversations with him—certainly in the first one, because that was quite a long conversation, and it was then that we went into all these things—he did set up the legal grounds upon which they were not liable, and he said they were not liable on this ground, and that ground, and the other ground, and he set them up and we discussed them.

Q. And after all that conversation you furnished that
218 proof on the 16th and also on January 12th?

A. Oh yes, furnished what was called for. The papers furnished on the 12th were in no way amendatory of the original proofs and did not refer to them. They were additional matters.

Q. Those papers that were furnished on the 12th were furnished after that conversation?

A. Yes sir, after the two conversations.

Q. When was Mr. Packard there?

A. I had a dozen conversations with Packard about paying this premium. He never was at the Trust Company's office. I met Packard on the streets.

Q. Don't you know Mr. Hobson, that Mr. Packard had nothing to do with the Sun Insurance Company at that time?

A. I knew he was a partner of Mr. Piper.

Q. You knew that he had been a partner of Mr. Piper?

A. The firm was Packard & Piper, at that time. They had offices [offices] together.

Witness: Mr. Packard to-day is the local agent of the Sun Company.

John F. Bell, a witness produced, sworn and examined on behalf of the plaintiff, in rebuttal, testified as follows.

Direct Examination.

By A. C. Campbell, Esq.

Q. Mr. Bell, I believe you are the Secretary of the International Trust Company, the plaintiff in these two actions?

A. Yes sir.

Q. How long have you held that position?

A. Ever since the company was formed.

219 Q. And when was that?

A. January, 1892.

Q. When did you receive knowledge that John R. Gordon had transferred the hotel property in Pueblo, Colorado, known as the Mesa Hotel, to the Mesa Hotel Company?

A. I think about a week after the fire; the first time that Gordon was in town.

Mr. Smith: We will admit that Mr. Thatcher will testify that he knew nothing of the transfer of the property by Mr. Gordon to the Hotel Company until after the fire.

The above and foregoing is all the evidence introduced or offered in this case, by either party thereto, and thereupon plaintiff rested.

And thereupon and at the conclusion of the testimony the defendant moved the Court for a finding and [judgement] for the defendant company, upon the ground that the evidence is insufficient to show a cause of action in favor of the plaintiff company, or to support a finding for the plaintiff company, or to support a judgment entered upon such finding for the plaintiff company. Which motion for judgment for the defendant company upon the evidence, is, by the Court, denied. To which ruling of the Court defendant company, by its counsel then and there duly excepted.

And thereupon defendant asked the Court to rule as a matter of law upon the evidence, that from the correspondence between The International Trust Company and The Investors 220 Mortgage Security Company Limited, relative to the repurchase of the Gordon note by The International Trust Company, which is in evidence, and from all the testimony and evidence relating thereto, the ownership and title of the said Gordon note did not vest in The International Trust Company, until after the issuing of defendant's policy. Which request was, by the Court, denied. And to the refusal of the Court to make said ruling defendant by its counsel then and there duly excepted. And to the ruling of the Court that the ownership and title did vest in The International Trust Company, prior to the issuing of its policy, defendant then and there duly excepted.

Defendant then and there requested the Court to rule as a matter of law, upon all the evidence, that The International Trust Company did not have an insurable interest in the property or in the indebtedness at the time of the issuing of defendant's policy. Which request was, by the Court, refused. And to the refusal of the Court to make the said ruling as requested, defendant by its counsel then and there duly excepted. And to the ruling of the Court that The International Trust Company did have an insurable interest at the time said policy was issued, defendant by its counsel then and there duly excepted.

Defendant then and there requested the Court to rule as a matter of law, based upon all the evidence that The International Trust Company did not have such an insurable interest, either in the property or in the indebtedness, as was 221 sufficient in law to sustain the policy, and did not have the insurable interest required by the terms of the policy and mortgagee clause.

Which request the Court denied, and to the ruling of the Court denying said request defendant by its counsel then and there duly excepted.

Thereupon the Court made the following findings, to-wit:

The above cause having come on for trial before the Court without a jury, upon an express stipulation of the parties in writing filed herein waiving a jury and agreeing to submit the matters of law and fact to the Court for its decision; and the Court having fully heard the evidence of plaintiff and defendant, and the argument of counsel for both parties, and having duly considered the same, doth, upon the evidence submitted to it, adjudge and find from such evidence the following facts.

I.

That on the 12th day of December, 1892, one John R. Gordon, was the owner of certain property in the City of Pueblo, State of Colorado, being lots 11, 12, 13, 14, 15 and 16, in block 126, formerly South Pueblo, now part of the City of Pueblo, together with the hotel building thereon in process of construction.

II.

That on the 12th day of December, 1892, the plaintiff, The International Trust Company, loaned to the said John R. Gor-
don the sum of $50,000, and as evidence of the same re-
222 ceived from the said John R. Gordon, his note, payable
June 12th, 1893, with interest at the rate of seven per
cent per annum; and to secure said note the said John R. Gordon did execute to one Mahlon D. Thatcher, as trustee, a deed of trust upon all and entire the property aforesaid.

III.

That on the 14th day of December, 1892, the defendant company, by and through its agent at Pueblo, Colorado, did issue a policy in the form of what is commonly known as builder's risk, in the name of John R. Gordon, upon the hotel building in process of construction, as aforesaid, to the amount of $10,000, with loss under such policy made payable to The International Trust Company and its assigns by a mortgagee clause attached to said policy in the form and substance hereinafter set out.

To which finding by the Court the defendant then and there duly excepted, because immaterial and not supported by the evidence.

IV.

That on or about the 29th day of December, 1892, the International Trust Company sold and transferred to the Investors

Mortgage Security Company, Limited, of Scotland, said note of John R. Gordon; that of the sale and transfer of said note no notice was ever given to defendant company.

V.

That prior to the 12th day of June, 1893, the said Investors Mortgage Security Company (Limited) had notified The International Trust Company, which acted as its agent, that it desired the Gordon loan to be paid at maturity, and 223 the said Trust Company thereupon and on the 12th day of June so notified the said John R. Gordon.

To which finding of the Court the defendant then and there duly excepted, because immaterial and not sustained by the evidence.

VI.

On the 12th day of June, 1893, when the loan of the said John R. Gordon became due and payable, he being unable to pay the same, and the holder of his said note demanding payment, The International Trust Company, by its executive committee, determined to re-purchase said loan and authorized the officers of said Company to so re-purchase it.

To which finding by the Court the defendant then and there duly excepted, because the same is immaterial, and not sustained by the evidence.

VII.

That in pursuance of such authority, The International Trust Company did, on the 12th day of June, 1893, re-acquire title to the said note of John R. Gordon by re-purchase, and did reacquire an insurable interest in and to the property covered by the policy of insurance issued by the defendant company, that the said Trust Company did, on the 12th day of June, 1893, actually pay to the said Investors Mortgage Security Company the sum of $1,750, being part of the amount due upon repurchase, and did issue the balance of the purchase price, viz: $50,000, and did from that time on, treat and dis- 224 pose of said note as its own property. That although said note has never been foreclosed, no definite extension of the same has ever been given and the same has remained in default ever since the 12th day of June, 1893.

To which finding by the Court the defendant then and there duly excepted, for that it is not sustained by the evidence, as more fully appears by the special exception to this finding hereinafter set out.

VIII.

That by agreement between The International Trust Company and the said Investors Mortgage Security Company, The International Trust Company was given time wherein to make the payment of the balance of $50,000 upon the re-purchase price, as aforesaid, and it did thereafter pay said amount in full to the Investors Mortgage Security Company with interest thereon at the rate of 7 per cent from June 12, 1893, to September, 12, 1893, and at the rate of 9 per cent from September 12th to the date of payment.

To which finding by the Court the defendant then and there duly excepted, because the same is not sustained by the evidence.

IX.

That on the 14th day of June, 1893, the vice president of The International Trust Company personally visited the offices of Henry O. Morris, agent of the defendant Company at Pueblo, Colorado, and did then and there inform said Henry O. Morris
that The International Trust Company was considering
225 whether it would foreclose the said Gordon loan or not;
that the question of insurance was an important element in determining that matter; that The International Trust Company desired to know whether the defendant Company would continue its insurance upon said hotel property, and had made arrangements for other insurance in case defendant's Company should decline so to do. Said officer of The International Trust Company also fully informed the said Morris of the condition of said building, and thereupon the said Morris assured the said officer of The International Trust Company that the defendant Company would continue to carry such insurance.

To which finding by the Court the defendant then and there duly excepted.

X.

That the said Henry O. Morris as agent of the defendant Company, was furnished with policies signed in blank, ready for delivery upon being filled out and countersigned by him as agent at Pueblo, on June 14th, 1893, and had full power and authority to accept risks and issue policies of insurance, according to his discretion within the City of Pueblo, in accordance with the general rules and regulations of said defendant Company, which said authority continued up to the 9th day of October, 1893.

To which finding by the Court the defendant then and there duly excepted, because immaterial and not sustained by the evidence.

XI.

That on the 14th day of June, 1893, and subsequent to 226 the visit of the vice president of The International Trust Company as aforesaid, the policy issued by defendant Company on the 14th of December, 1892, having expired, said defendant Company did, by and through its agent, Henry O. Morris, issue a renewal policy of insurance in the name of John R. Gordon, upon the Mesa Hotel property aforesaid, for the sum of $5,000, expiring December 14th, 1893, with loss, if any, under said policy, payable to the International Trust Company and its assigns, by virtue of the provisions of a mortgagee clause attached to said policy, which was in words and figures as follows, to-wit:

Whereas, The property described in this Policy has been conveyed to M. D. Thatcher in trust, to secure the payment of a certain indebtedness to The International Trust Company, Denver, Colorado:

And Whereas, the owner of the Policy has requested that the loss, if any, be made payable to the said Company: Therefore, the loss, if any, is made payable to The International Trust Company, Denver, Colorado, and its assigns.

It Being Hereby Understood and Agreed, That this insurance, as to the interest of the Mortgagee or Trustee only therein, shall not be invalidated by any act or neglect of the Mortgagor or owner of the property insured, nor by the occupation of the premises for purposes more hazardous than are permitted by the terms of this Policy. Provided, that in case the Mortgagor or owner neglects or refuses to pay any premium due under this Policy, then on demand, the Mortgagee or Trustee shall pay the same. Provided, also, that the Mortgagee or Trustee shall notify this Company of any change of ownership or increase of hazard which shall come to his, or their knowledge, and shall have permission for such change of ownership or increase of hazard duly endorsed on this Policy. And Provided Further, that every increase of hazard not permitted by the Policy to the Mortgagor or owner, shall be paid for by the Mortgagee or Trustee on reasonable demand,and after demand made by this Company upon; and refusal by the Mortgagor or owner to pay, according to the established schedule of rates. It is, however, understood that this Company reserves the right to cancel this Policy, as stipulated in the printed conditions of said policy; and, also, to cancel this agreement on giving ten days' notice of its intention to the Trustee or Mortgagee named therein, and from and after the expiration of the said ten days this agreement shall be null and void. It is Further Agreed that in case of any other insurance upon the property hereby insured, then this Company shall not be liable, under this Policy, for a greater portion of any loss sustained than the sum hereby insured bears to the whole amount of insurance on said property, issued to or held by any party or parties having an insurable interest therein. It is also agreed that whenever this Company shall pay the Mortgagee or Trustee any sum for loss under this Policy, and shall claim that as to the Mortgagor or owner no liability therefor exists, it shall at once and to the extent of such payment be legally subrogated to all the rights of the party to whom such payment shall be made, under any and all securities held by such party for the payment of said debt. But such subrogation shall be in subordination to the claim of said party for the balance of the debt so secured. Or said Company may, at its option, pay the said Mortgagee or Trustee the whole debt so secured, with all the interest which may have accrued thereon to the date of such payment, and shall thereupon receive from the party to whom such payment shall be made an assignment and transfer of said debt, with all securities held by said parties for the payment thereof.

In testimony that the foregoing provisions are made a part of Policy No. 4,475,189, of Sun Insurance Office Insurance Company of London, to which they are attached, witness my hand at Pueblo, Colo., this 14th day of June, A. D. 1893.

HENRY O. MORRIS, Agent.

Accepted and agreed to by

THE INTERNATIONAL TRUST COMPANY.
By HENRY W. HOBSON, Vice Pres.

And said policy with a mortgagee clause attached was thereupon transmitted to The International Trust Company and has been in its possession ever since its receipt.

To which finding by the Court the defendant then and there duly excepted.

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XII.

That on the 14th day of June, 1893, the defendant Company, by and through its agent, as aforesaid, had notice that the loan of the said John R. Gordon was in default and unpaid; that the ownership of the same was claimed by The International Trust Company; that furthermore, the agent of defendant company in issuing said renewal dealt directly with The International Trust Company and with the understanding and knowledge that such policy of insurance with mortgagee clause attached was issued for the benefit and protection of said Trust Company; that furthermore, after the 14th day of

June, 1893, and prior to the time when the property insured was destroyed by fire, the agent of defendant company dealt directly with The International Trust Company, and it was understood that said policy of insurance was in existence and was being carried for the benefit and protection of The International Trust Company as the owner of the said note of John R Gordon.

To which finding by the Court the defendant then and there duly excepted, because the same is not sustained by the evidence.

XIII.

That on or about the 3rd day of July, 1893, the said John R. Gordon transferred the title to the real estate and Mesa Hotel property aforesaid to a corporation known as The Mesa Hotel & Improvement Company, the deed of conveyance being recorded on the 3rd day of July, 1893.

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XIV.

That neither The International Trust Company nor any officer thereof, nor the said M. D. Thatcher, trustee, had any notice or knowledge of such conveyance whatsoever until subsequent to the destruction of the said hotel building by fire on the 9th of October, 1893, as hereinafter set out; nor did the defendant have any such notice or knowledge of the conveyance aforesaid.

XV.

That in the month of September, 1893, the said John R. Gordon, not having paid the premium on the policy issued by the defendant company on the 14th day of June, 1893, as aforesaid, and demand having been made upon The International Trust Company by the agent of the defendant company for the payment of said premium, the said Trust Company did, in pursuance of the provisions of the mortgagee clause attached to the policy aforesaid, pay to the agent of defendant Company the premium upon said policy in full, and the money so paid as premium has been ever since said date in the possession of the agent of defendant Company or of defendant Company itself.

To which finding by the Court the defendant then and there duly excepted.

XVI.

That on the 9th day of October, 1893, the hotel building covered by the policy of insurance aforesaid was, without any fault on the part of The International Trust Company or of the said John R. Gordon, destroyed by fire, and the loss for all practical purposes was total; that the value of said hotel 229 building at the date of the fire was $130,000, and the loss occasioned by said fire was $130,000; that the amount of insurance upon said hotel building at the time of said fire did not exceed in any event $40,000, even if it reached that amount.

That at the time of said fire The International Trust Company was still the owner of the note of John R. Gordon aforesaid and had an insurable interest in and to the hotel property aforesaid; that the note of the said John R. Gordon is still due and unpaid.

To which finding by the Court the defendant then and there duly excepted.

XVII.

That on the 12th day of October, 1893, notice of such fire (in writing) was given to the defendant Company by The International Trust Company, in accordance with the terms of the policy of insurance aforesaid.

XVIII.

That on the 3d day of November, 1893, proofs of loss were furnished to defendant Company by The International Trust Company, which said proofs of loss were in accordance and complied with the requirements of the provisions of the policy of insurance aforesaid.

To which finding by the Court the defendant then and there duly excepted.

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XIX.

That on or about the .... of January, 1894, The International Trust Company did voluntarily and without any demand on the part of the defendant Company, serve upon the defendant Company a notice to the effect that by mistake it had included in the proofs of loss aforesaid a policy of insurance issued by the Alliance Assurance Company of London for $10,000, under which The International Trust Company had no legal claim, and having discovered such mistake, desired to correct the same.

XX.

That the facts with regard to the policy of the Alliance Company, concerning which said mistake was made, were fully known to the State agent of said defendant Company soon after the destruction of said hotel by fire, and no objection was ever at any time made by defendant Company on account of the mention of said Alliance policy in the proofs of loss, and no point was ever made concerning the mistake aforesaid until after suit was brought against defendant Company. Furthermore, that the mistake aforesaid was made in good faith and inadvertently and was immaterial, and did not in any wise affect the validity of the original proofs as filed, and did not in any wise prejudice defendant Company in its determination as to the payment or refusal of payment of said policy.

To which finding by the Court the defendant then and there duly excepted, because the same is not sustained by the evidence.

XXI.

231 That defendant Company by all of its actions and conduct from the time of said fire or shortly after, denied its liability under said policy upon grounds foreign to the matter of proofs of loss, and arising out of transactions occurring before the fire. And the defendant Company did, by and through its agents, prior to the bringing of suit in this action, deny its liability under said policy upon grounds and matters arising prior to the destruction of the said hotel property; that the defense of defendant Company in this suit, as shown by the evidence, principally rests upon grounds entirely foreign to the proofs of loss, and going to the question of its liability under said policy at the time of said fire. And furthermore, that defendant Company did make a tender of the premium paid by The International Trust Company, as hereinbefore set out, and claimed the right to cancel said policy.

To which finding by the Court, except as to that part of finding that defendant made tender of the premium, the defendant then and there duly excepted, as not sustained by the evidence.

XXII.

That there never was any appraisal concerning the amount of loss, under the provisions of the policy of insurance aforesaid, nor was any appraisal ever demanded by either party.

XXIII.

232 That suit was begun by The International Trust Company against defendant Company, on the 16th day of February, 1894, more than sixty days after the proofs of loss had been furnished by The International Trust Company to defendant Company.

To which finding by the Court the defendant then and there duly excepted, because not sustained by the evidence.

XXIV.

Upon the foregoing facts the Court finds as a matter of law, that plaintiff company is entitled to a judgment against defendant company under said policy for the sum of five thousand dollars ($5,000) with interest at eight per cent. per annum from the 3rd day of January, 1894.

To which finding by the Court the defendant then and there duly excepted.

And thereupon then and there the defendant Company by its counsel excepted to said findings of the Court as follows, to-wit:

And to the special findings of fact made by the Court and to each of them, defendant then and there excepted, on the ground that said findings and neither of them, are supported by the evidence.

And defendant further excepts specifically to the 7th finding of fact made by the Court, on the ground that said special finding of fact as to the ownership of said Gordon note, is a conclusion of law from the evidence and not a finding of fact, and because the finding that The International Trust
233 Company had an insurable interest at the time of the issuing of the policy, is a conclusion of law, and not a finding of fact, and because it was shown by the evidence that the entire negotiations relating to the purchase of the Gordon note by The International Trust Company, were conducted by correspondence, which is in evidence and fully set forth in the record, and that said correspondence and all the evidence relating thereto, shows as a matter of law that the ownership and title to said note was not acquired by nor vested in The International Trust Company at the time the policy of defendant was issued, and because said correspondence and all the evidence relating thereto shows as a matter of law that The International Trust Company did not have at the time said policy was issued a valid, legal or sufficient insurable interest in the property or in the indebtedness to support the policy and mortgagee clause, and did not have the insurable interest required and called for by the policy and mortgagee clause; and to the making by the Court of said special finding over the objection of defendant, the defendant then and there by counsel duly excepted.

Defendant as a substitute for and in lieu of the fourth special finding, requested the Court to find as follows:

"That on or about the 29th of December, 1892, The International Trust Company sold and transferred, and endorsed without recourse, to The Investors Mortgage Security Company, Limited, of Scotland, said note of John R. Gordon, and of the sale and transfer of said note, no notice was ever given to defendant Company."

234 Which finding so requested the Court refused to make, and to the refusal of the Court defendant by counsel then and there duly excepted.

Defendant as a substitute for and in lieu of the fifth special finding, requested the Court to find as follows:

"That prior to the 12th day of June, 1893, the said Investors Mortgage Security Company, Limited, of Scotland, had transmitted the Gordon note to The International Trust Company for collection; the same being received for collection on June 7th, 1893; and said Investors Company had informed the International Trust Company that, 'On the repayment of the Gordon loan on the 12th of June they should require the money at their bankers in New York;' and the Trust Company Company thereupon on the 12th day of June so notified the said John R. Gordon."

Which finding the Court refused, and to the refusal of the Court the defendant by counsel then and there duly excepted.

And as a substitute for and in lieu of the eighth special finding, the defendant requested the Court to find as follows:

"That by agreement between The International Trust Company and the Investors Mortgage Security Company, which agreement was made by correspondence, being a proposition from the Investors Company by letter of August 21, 1893, and the acceptance of said proposal by The International Trust Company September 25, 1893, The International Trust Company paid $10,000 on September 12, 1893, as a part payment in the re-purchase of the Gordon note, together with the interest upon said note at the rate of 7 per cent. from June 12, 1893, to September 12, 1893; and was given time wherein to make a payment of the balance of $40,000 upon said note with interest at the rate of 9 per cent. from September 12, to date of payment."

235 Which request and finding the Court refused, and to the refusal of the Court the defendant by counsel then and there duly excepted.

Defendant as a substitute for and in lieu of the tenth special finding, requested the Court to find as follows:

"That the said Henry O. Morris as agent of the defendant Company, was furnished with policies signed in blank ready for delivery, upon being properly filled up and countersigned by him as agent, at Pueblo. And on June 14th, 1893, had full power and authority to accept risks and issue policies of insurance within the City of Pueblo, in accordance with the general rules and regulations of defendant Company, and in accordance with the authority set out in the policies of defendant Company, which said authority continued up to the 9th day of October, 1893."

Which request and finding the Court refused, and to the refusal of the Court the defendant by counsel then and there excepted.

Defendant as a substitute for and in lieu of the twelfth special finding, requested the Court to find as follows:

"On the 14th day of June, the vice president of the International Trust Company informed Agent Morris that the loan of the said John R. Gordon was in default and unpaid and that The International Trust Company owned the note. That there is no evidence as to whether upon issuing the policy in suit, it was sent directly to The International Trust Company or whether it was sent by Gordon. That the premium for the said policy was charged to the said Gordon, and that the said Morris had all his dealings with the said John R. Gordon, except that, at the request of Gordon, he notified the International Trust Company that the premium had not been paid by Gordon and at the request of said International Trust Company sent Gordon's bill to that Company on the 23rd day of September, 1893."

Which request and finding the Court refused, and to the refusal of the Court the defendant by counsel then and there excepted.

236 Defendant as a substitute for and in lieu of the fifteenth special finding, requested the Court to find as follows:

"That on the 26th day of September, 1893, the said John R. Gordon not having paid the premium on the policy issued on June 14, 1893, as aforesaid, and said Gordon having solicited and requested the International Trust Company to pay the same, and the said Morris having notified the International Trust Company on or about the 1st of September, that the premium had not been paid by Gordon, and that he was about to cancel the policy, and the said International Trust Company having requested him to delay the said cancellation until he heard from it, the said International Trust Company did, on the 22nd day of September, 1893, request the said Morris to send the said Gordon's bill for said premium to said International Trust Company, which the said Morris did on the following day, and thereupon the said International Trust Company on the 26th of September, 1893, paid the said premium on the said policy in full. And the money so paid as premium remained in the possession of the agent of defendant Company, or of defendant Company, itself, up and until the 21st day of February, 1894; but at the time of the payment of the premium, neither the defendant nor its agent Morris had any knowledge of the sale of the Gordon note to the Investors Company, nor of any sale of the property by Gordon, but believed at all times until after the fire that The International Trust Company was at all times the sole and unconditional owner of the Gordon indebtedness and note and that Gordon was the sole and unconditional owner of the building subject to the trust deed to Thatcher. That after the fire and after the bringing of this suit, and on to-wit, the 21st day of February, 1894, and when the defendant had been informed of the sale and transfer of said property and note, the defendant duly tendered back to the International Trust Company the said premium, and all costs which had accrued in said suit up to the date of tender, to-wit, the amount of $72.21, which plaintiff refused to accept, and said tender was kept good by the deposit of the sum of $72.21 with the Clerk of this Court."

237 Which request and finding the Court refused, and to the refusal of the Court the defendant by counsel then and there excepted.

Defendant as a substitute for and in lieu of the Eighteenth special finding, requested the Court to find as follows:

"That on the 3rd day of November, 1893, proofs of loss were furnished to the defendant Company by The International Trust Company, which said proofs of loss were in substantial conformity with the requirements of the policy so far as they went. That on the 6th day of December, 1893, proofs of loss executed by John R. Gordon on December 4, 1893, were furnished to the defendant not as a separate claim but as a part and parcel of the claim and an additional proof of plaintiff Company. That the plaintiff by its proof of loss offered to furnish any other information that might be required on call, and that the same should be considered a portion of the original proofs. That on the 5th day of January, 1895, the defendant Company by its general agent, E. P. Piper, by letter notified the plaintiff that the said proofs of loss so furnished on November 3, 1893, were incorrect and incomplete and could not be accepted as complying with the terms and conditions of the policy of insurance,

and that the Company, defendant, on said date informed the plaintiff that it the defendant could not tell from said proofs of loss whether or not it was indebted to the plaintiff for any loss under the policy, or if indebted, to what amount, and disputed the fact and claim of the plaintiff that it had suffered a loss to the extent of $125,000. And that it the defendant Company, rejected the said documents, and declined to receive them as satisfactory proofs of loss under the terms of the policy, and requested the plaintiff to furnish further proofs of loss. That the plaintiff Company as a compliance with said request, delivered to defendant Company a further statement or proof of loss, which was received by defendant on the 12th day of January, 1894, and which defendant acknowledged was a substantial compliance with the terms and provisions of the policy so far as the furnishing of proofs of loss were concerned; but neither admitted or denied the truth of the contents thereof or the facts set out therein, or in the original proofs, but that plaintiff had called for everything called for. That in
238 said proof of loss so furnished by plaintiff on November
3, 1893, plaintiff stated that it held at the time of the fire a total insurance of $50,000, and that among other policies comprising the $50,000 insurance were two policies of $10,000 each in the Alliance Insurance Company."

Which request and finding the Court refused, and to the refusal of the Court the defendant by counsel then and there excepted. Defendant as a substitute for and in lieu of the nineteenth special finding, requested the Court to find as follows:

"That on or about the 16th of January, 1894, the plaintiff The International Trust Company, did voluntarily and without any demand on the part of the defendant Company, serve upon the defendant Company a notice and sworn statement as an amendment to its original proof of loss, amending the original statement by its terms in respect to the amount of insurance, which amendment was to the effect that the plaintiff in fact held but one policy for $10,000 in the Alliance Insurance Company, instead of two policies for a total amount of $20,000; and that the entire amount of insurance held by the plaintiff at the time of the fire was $40,000, instead of $50,000. This amended statement was delivered to the defendant within thirty days immediately preceding the date at which this suit was instituted, and a statement furnished on the 12th of January, 1894, was delivered to the defendant within forty-five days immediately preceding the date at which this suit was instituted. That on the 22nd of January, 1894, plaintiff Company furnished the defendant Company a magistrate's certificate which was done at the request of defendant Company in its letter of January 5, to the plaintiff Company."

Which request and finding the Court refused, and to the refusal of the Court the defendant by counsel then and there excepted. Defendant as a substitute for and in lieu of the twentieth special finding, requested the Court to find as follows:

239 "That the facts relating to the issuing of the policy of the Alliance Company were fully known to the State Agent of defendant Company soon after the destruction of said hotel by fire. That the said Alliance policy was a few days previous to the fire delivered by the agents of that Company to the State Agent of the Insurance Company of North America for the purpose of taking up the policy of the Insurance Company of North America, then in the hands of the plaintiff Company. That said State Agent of the Insurance Company of North America had presented at plaintiff's office in Denver the Alliance policy for substitution for the policy of the Insurance Company of North America at the hour the property was burning, and plaintiff had refused to accept or substitute it; but plaintiff nevertheless subsequently made claim against the Alliance Insurance Company under that policy, and had informed this defendant by its original proof of loss that it claimed to be insured under the said Alliance policy. That up to the 16th day of January the plaintiff had not informed the defendant that its claim against the Alliance Company had been compromised or abandoned. The defendant Company had at no time objected to the mention of said Alliance policy in said original proof of loss."

Which request and finding the Court refused, and to the refusal of the Court the defendant by counsel then and there excepted.

Defendant as a substitute for and in lieu of the twenty-first special finding, requested the Court to find as follows:

"The only communication that was produced in evidence as made by the defendant Company to the plaintiff, relative to its liability was the letters of State Agent Piper, to the plaintiff Company on January 5, and February 21, 1894, in the first of which defendant says:

"Gentlemen: There was recently received by the Sun Insurance Office documents purporting to be a notice of loss and statement thereof, setting forth a claim against said Company under a policy numbered 4,475,189. The Sun Insurance Office now begs to advise you that, after careful examination of the documents referred to, it finds them so apparently incorrect and incomplete that they cannot be accepted as complying with the terms and conditions of the policy of insurance; 240 that this Company is unable to ascertain from the documents whether or not it is indebted to the claimants for any loss under said policy or if indebted, to what amount, and to whom so indebted."

That by the letter of its State Agent Piper, of February 21, 1894, which was written after the beginning of suit, the defendant demanded that its policy be surrendered for cancellation. That the only conversation relative to defendant's liability ever had by any of its agents was one between State Agent Piper and the vice president of The International Trust Company, wherein a discussion of the merits of a suit should one be brought, the liability of the defendant upon its policy, and the circumstances of the fire, was had. That previous to entering into said discussion, it was mutually understood and agreed that it was to be a personal discussion between said parties in a friendly manner, and without reference to their acts or conduct as agents or officers of their respective Companies, and without affecting either of said Companies in case of suit or otherwise and simply as a friendly discussion between two individuals, each giving their respective ideas of the matters discussed. That at said discussion State Agent Piper outlined the reasons why defendant would not be liable on its policy, but he neither admitted or denied the liability of his Company. That the testimony does not show that State Agent Piper or any other representative of defendant Company ever admitted or denied liability under the policy in suit."

Which request and finding the Court refused, and to the refusal of the Court the defendant by counsel then and there excepted.

Defendant as a substitute for and in lieu of the twenty-second special finding, requested the Court to find as follows:

"That there was never any arbitration or appraisal concerning the amount of loss under the provisions of the policy of insurance aforesaid, nor was there ever any appraisement or estimate of agreement by the defendant and the plaintiff or by the defendant and Gordon as to the amount of loss nor was an arbitration ever demanded by either party. That defendant by its letter of January 5, 1894, questioned and disputed the amount of loss which the plaintiff by its proofs of loss claimed to have sustained."

241 Which request and finding the Court refused, and to the refusal of the Court the defendant by counsel then and there excepted.

Defendant as a substitute for and lieu of the twenty-third special finding, requested the Court to find as follows:

"That suit was begun by The International Trust Company against the defendant Company on the 17th day of February, 1894, more than sixty days after the original proofs of loss had been furnished by The International Trust Company to the defendant Company, but within less than forty-five days after the amendment or additional proof of loss was furnished on January 12, 1894, and within thirty-three days after the amendments of the proof of loss furnished on January 16, 1894."

Which request and finding the Court refused, and to the refusal of the Court the defendant by counsel then and there excepted.

And in lieu of and as a substitute for the twenty-fourth special finding, being the finding of law that plaintiff is entitled to judgment, the defendant requested that judgment be entered for defendant.

Which request the Court refused, and to the refusal of the Court to enter judgment for defendant, the defendant by counsel then and there duly excepted.

And thereupon the Court directed that judgment be entered in favor of plaintiff company and against the defendant company. And to the giving and entry of judgment in favor of plaintiff company and against defendant company, the defendant by counsel then and there duly excepted.

242 MEMORANDUM.

The Exhibits hereto attached are not identified by consecutive numbers, for the reason that the testimony of the Plaintiff Company against The Ins. Co. No. America was taken together with the case of the plaintiff Company against The Sun Insurance Office, and the intervening numbers omitted from this bill of exceptions are Exhibits of the case of The Insurance Company of North America only.

Exhibit 1 is an application by John R. Gordon for a loan of $50,000, upon the Mesa Hotel property, the original Exhibit introduced in evidence being omitted by consent of the parties.

EXHIBIT 1.

Exhibit 2 is the trust deed from John R. Gordon to Mahlon D. Thatcher, Trustee, given to secure the loan from The International Trust Company to John R. Gordon; the original Exhibit as filed in Court being omitted herefrom by consent of the parties.

EXHIBIT 2.

243 EXHIBIT 3.

Due 12 June, 1893.

The International Trust Company.

$50,000≠ Denver, Colorado, December 12th, 1892.

On the 12th day of June, A. D. 1893, for value received I promise to pay to the order of The International Trust Company, the principal sum of Fifty thousand Dollars in gold coin with interest thereon, at the rate of seven (7) per cent per annum from date, until maturity, payable semi annually according to the tenor of one (1) interest notes hereto attached bearing even date herewith, both principal and interest payable at the office of The International Trust Company, Denver, Colo.

This note bears interest from maturity until paid at the rate of Ten (10) per cent per annum. On failure to pay any installment of interest when due the holder may collect the principal and interest at once.

JOHN R. GORDON.

No. 1026.
Ex. 3.

This note is secured by Trust Deed on Lots No. 11 to 16 inclusive, Block 126 in South Pueblo.

$1750≠ Denver, Colo., Dec. 12th, 1892.

On the 12th day of June, 1893, for value received I promise to pay to the order of The International Trust Company Seventeen Hundred fifty Dollars at the office of The International Trust Company, Denver, Colo., being the interest due on a principal Note No. 1023 for $50,000 of even date herewith. This note bears interest from maturity until paid at the rate of ten per cent per annum.

JOHN R. GORDON.

No. 1———

The International Trust Company, Denver, Colo.

244 (Indorsed.)—Gordon No. 541. $50,000. Coupon Trust Deed Note. Interest and Principal payable at the office of The International Trust Company, Denver, Colo. For value received, We hereby transfer and assign the within Note, together with all interest in and rights under the Trust Deed securing the same, to the Investors Mortgage Security Co., Ld., without recourse. The International Trust Company, by John F. Bell, Secy. Pay John F. Bell, Trustee for Investors Mortgage Security Company, Limited, Guild & Shepherd, Secretaries. Pay The International Trust Company or order without recourse. John F. Bell, Trustee.

By Colorado laws the property securing the note is conveyed to a trustee who holds it in trust for the note holder until the note is paid; if the interest or the principal is not paid the property may be sold, four weeks newspaper notice being required.

The transfer of the note carries the trust deed with it, no other transfer being necessary.

EXHIBIT 9.

This is a portion of the abstract of title introduced in evidence, and shows that at the time of the loan made by Gordon in December, 1892, the title to said property was vested in John R. Gordon in fee simple, and that the trust deed to Mahlon D. Thatcher, given to secure said loan, constituted a valid and subsisting first lien upon the said hotel property continuously until after the fire, and the Exhibit in full is omitted herefrom by consent of the parties.

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EXHIBIT 13.

No. 4775189. $5000.

SUN INSURANCE OFFICE,

Established 1710.

Head office, 63 Threadneedle st., London, Eng.; U. S. Branch 54 Pine Street, New York; Rocky Mountain Department, Denver, Colo.

In consideration of the stipulations herein named and of Fifty-two and 50/100 Dollars premium does insure J. R. Gordon, Esq., for the term of six months from the 14th day of June, 18–3, at noon, to the 14th day of December, 18–3, at noon, against all direct loss or damage by fire, except as hereinafter provided, to an amount not exceeding Five thousand Dollars, to the following described property while located and contained as described herein, and not elsewhere, to wit:

J. R. Gordon.

$5000.00—For six months, on the six story and basement stone, brick and iron building, in course of construction including foundations, plate glass of all sizes, while set in building, frescoed work and gilding on walls and ceilings, heating apparatus, plumbing, sewer, gas and water pipes, radiators, tiling, gas and electric light fixtures, chandeliers and electric light wiring, elevator and elevator apparatus, and fixtures and sidewalks around said building; and on all building materials, supplies and machinery contained in and about above premises and in frame carpenter shop adjoining, situate on lots Nos. 8, 9, 10, 11, 12, 13, 14, 15, 16, in block No. 126, of the former town of South Pueblo, now City of Pueblo, Colorado.

To be occupied and known as the "Hotel Mesa."

Other concurrent insurance permitted.

Lightning clause and gasoline stove permit attached to policy. Loss, if any, payable to M. D. Thatcher, trustee for the International Trust Company, of Denver, Colorado, as his interest may appear.

(Their regular subrogation clause attached to Policy.)

Whereas, The property described in this Policy has been conveyed to M. D. Thatcher in trust, to secure the payment of a certain indebtedness to The International Trust Company, Denver, Colorado.

And Whereas, the owner of the Policy has requested that the loss, if any, be made payable to the said Company: Therefore, the loss, if any, is made payable to The International Trust Company, Denver, Colorado, and its assigns.

It Being Hereby Understood and Agreed, That this insurance, as to the interest of the Mortgagee or Trustee only therein, shall not be invalidated by any act or neglect of the Mortgagor or owner of the property insured, nor by the occupation of the premises for purposes more hazardous than are permitted by the terms of this Policy. Provided, that in case the Mortgagor or owner neglects or refuses to pay any premium due under this Policy, then, on demand, the Mortgagee or Trustee shall pay the same. Provided, also, that the Mortgagee or Trustee shall notify this Company of any change of ownership or increase of hazard which shall come to his or their knowledge, and shall have permission for such change of ownership or increase of hazard duly endorsed on this Policy. And Provided Further, that every increase of hazard not permitted by the Policy to the Mortgagor or owner, shall be paid for by the Mortgagee or Trustee on reasonable demand, and after demand made by this Company upon, and refusal by the Mortgagor or owner to pay, according to the established schedule of rates. It is, however, understood that this Company reserves the right to cancel this Policy, as stipulated in the printed conditions of said Policy; and, also, to cancel this agreement on giving ten days' notice of its intention to the Trustee or Mortgagee named therein, and from and after the expiration of the said ten days this agreement shall be null and void. It is Further Agreed, that in case of any other insurance upon the property hereby insured, then this Company shall not be liable, under this Policy, for a greater portion of any loss sustained than the sum hereby insured bears to the whole amount of insurance on said property, issued to or held by any party or parties having an insurable interest therein. It is also Agreed that whenever this Company shall pay the Mortgagee or Trustee any sum for loss under this Policy, and shall claim that as to the Mortgagor or owner no liability therefor exists, it shall at once and to the extent of such payment be legally subrogated to all the rights of the party to whom such payment shall be made, under any and all securities held by such party for the payment of said debt. But such subrogation shall be in subordination to the claim of said party for the balance of the debt so secured. Or said Company may, at its option, pay the said Mortgagee or Trustee the whole debt so secured, with all the interest which may have accrued thereon to the date of such payment, and shall thereupon receive from the party to whom such payment shall be made an assignment and transfer of said debt, with all securities held by said parties for the payment thereof.

In testimony that the foregoing provisions are made a part of Policy No. 4475189, of Sun Ins. Office, Insurance Company of London, to which they are attached, witness my hand at Pueblo, Colo, this 14th day of June, A. D. 1893.

HENRY O. MORRIS, Agent.

Accepted and agreed to by

THE INTERNATIONAL TRUST COMPANY.

By HENRY W. HOBSON,

Vice Pres.

* * * * * * *

(1) This company shall not be liable beyond the actual cash value of the property at the time any loss or damage occurs, and the loss or damage shall be ascertained or estimated according to such actual cash value, with proper deduction for (2) depreciation however caused, and shall in no event exceed what it would then cost the insured to repair or replace the same with material of like kind and quality; said ascertainment or estimate shall be made by the insured and this company, or, if (3) they differ, then by appraisers, as hereinafter provided; and, the amount of loss or damage having been thus determined, the sum for which this company is liable pursuant to this policy shall be payable sixty days after due notice, ascertainment, (4) estimate, and satisfactory proof of the loss have been received by this company in accordance with the terms of this policy. It shall be optional, however, with this company, to take all, or any part, of the articles at such ascertained or appraised value, (5) and also to repair, rebuild, or replace the property lost or damaged with other of like kind and

quality within a reasonable time on giving notice, within thirty days after the receipt of the proof herein required, of its intention so to do; but there can be (6) no abandonment to this company of the property described.

(7) This entire policy shall be void if the insured has concealed or misrepresented, in writing or otherwise, any material (8) fact or circumstance concerning this insurance or the subject thereof; or if the interest of the insured in the property be not (9) truly stated herein; or in case of any fraud or false swearing by the insured touching any matter relating to this insurance or (10) the subject thereof, whether before or after a loss.

(11) This entire policy, unless otherwise provided by agreement indorsed hereon or added hereto, shall be void if the in-(12) sured now has or shall hereafter make or procure any other contract of insurance, whether valid or not, on property covered (13) in whole or in part by this policy; or if the subject of insurance be a manufacturing establishment and it be operated in whole (14) or in part at night later than ten o'clock, or if it cease to be operated for more than ten consecutive days; or if the hazard be (15) increased by any means within the control or knowledge of the insured; or if mechanics be employed in building, altering, or (16) repairing the within described premises for more than fifteen days at any one time; or if the interest of the insured be other (17) than unconditional and sole ownership; or if the subject of insurance be a building on ground not owned by the insured in (18) fee-simple; or if the subject of insurance be personal property and be or become incumbered by a chattel mortgage; or if, with (19) the knowledge of the insured, foreclosure proceedings be commenced or notice given of sale of any property covered by this (20) policy by virtue of any mortgage or trust deed; or if any change, other than by the death of an insured, take place in the (21) interest, title, or possession of the subject of insurance (except change of occupants without increase of hazard) whether by legal (22) process or judgment or by voluntary act of the insured, or otherwise; or if this policy be assigned before a loss; or if illuminating (23) gas or vapor be generated in the described building (or adjacent thereto) for use therein; or if (any usage or custom of trade or (24) manufacture to the contrary notwithstanding) there be kept, used, or allowed on the above described premises, benzine, benzole, (25) dynamite, ether, fireworks, gasolene, greek fire, gunpowder exceeding twenty-five pounds in quantity, naphtha, nitro-glycerine (26) or other explosives, phosphorus, or petroleum or any of its products of greater inflammability than kerosene oil of the United (27) States standard, (which last may be used for lights and kept

for sale according to law but in quantities not exceeding five barrels, (28) provided it be drawn and lamps filled by daylight or at a distance not less than ten feet from artificial light); or if a building (29) herein described, whether intended for occupancy by owner or tenant, be or become vacant or unoccupied and so remain for (30) ten days.

(31) This company shall not be liable for loss caused directly or indirectly by invasion, insurrection, riot, civil war or com-(32) motion, or military or usurped power, or by order of any civil authority; or by theft; or by neglect of the insured to use all (33) reasonable means to save and preserve the property at and after a fire or when the property is endangered by fire in neighboring (34) premises; or (unless fire ensues, and, in that event, for the damage by fire only) by explosion of any kind, or lightning; but (35) liability for direct damage by lightning may be assumed by specific agreement hereon.

(36) If a building or any part thereof fall, except as the result of fire, all insurance by this policy on such building or its contents (37) shall immediately cease.

(38) This company shall not be liable for loss to accounts, bills, currency, deeds, evidences of debt, money, notes or securities; (39) nor, unless liability is specifically assumed hereon, for loss to awnings, bullion, casts, curiosities, drawings, dies, implements, (40) jewels, manuscripts, medals, models, patterns, pictures, scientific apparatus, signs, store or office furniture or fixtures, sculpture, (41) tools, or property held on storage or for repairs; nor, beyond the actual value destroyed by fire, for loss occasioned by ordinance (42) or law regulating construction or repair of buildings, or by interruption of business, manufacturing processes, or otherwise; nor (43) for any greater proportion of the value af plate glass, frescoes, and decorations than that which this policy shall bear to the whole (44) insurance on the building described.

(45) If an application, survey, plan or description of property be referred to in this policy it shall be a part of this contract and (46) a warranty by the insured.

(47) In any matter relating to this insurance no person, unless duly authorized in writing, shall be deemed the agent of this (48) company.

(49) This policy may by a renewal be continued under the original stipulations, in consideration of premium for the renewed (50) term, provided that any increase of hazard must be made known to this company at the time of renewal or this policy shall be void.

(51) This policy shall be canceled at any time at the request of the insured; or by the company by giving five days notice of (52) such cancellation. If this policy shall be canceled as hereinbefore provided, or become void or cease, the premium having been (53) actually paid, the unearned portion shall be returned on surrender of this policy or last renewal, this company retaining the (54) customary short rate, except that when this policy is canceled by this company by giving notice it shall retain only the pro rata (55) premium.

(56) If, with the consent of this company, an interest under this policy shall exist in favor of a mortgagee or of any person or(57) corporation having an interest in the subject of insurance other than the interest of the insured as described herein, the (58) conditions hereinbefore contained shall apply in the manner expressed in such provisions and conditions of insurance relating to such (59) interest as shall be written upon, attached, or appended hereto.

If property covered by this policy is so endangered by fire as to require removal to a place of safety, and is so removed, (60) that part of this policy in excess of its proportion of any loss and of the value of property remaining in the original location, shall, (61) for the ensuing five days only, cover the property so removed in the new location; if removed to more than one location, such (62) excess of this policy shall cover therein for such five days in the proportion that the value in any one such new location bears (63) to the value in all such new locations; but this company shall not, in any case of removal, whether to one or more locations, be (64) liable beyond the proportion that the amount hereby insured shall bear to the total insurance on the whole property at the time (65) of fire, whether the same cover in new location or not. (66)

If fire occur the insured shall give immediate notice of any loss thereby in writing to this company, protect the property (67) from further damage, forthwith separate the damaged and undamaged personal property, put it in the best possible order, (68) make a complete inventory of the same, stating the quantity and cost of each article and the amount claimed thereon; and, (69) within sixty days after the fire, unless such time is extended in writing by this company, shall render a statement to this company, (70) signed and sworn to by said insured, stating the knowledge and belief of the insured as to the time and origin of the fire; (71) the interest of the insured and of all others in the property; the cash value of each item thereof and the amount of loss thereon; (72) all incumbrances thereon; all other insurance, whether valid or not, covering any of said property; and a copy of all the descriptions(73) and schedules in all policies; any changes in the title, use, occupation, location, possession, or exposures of said property (74) since the issuing of this policy; by whom and for what purpose any building herein described and the several parts thereof were (75) occupied at the time of fire; and shall furnish, if required, verified plans and specifications of any building, fixtures, or (76) machinery destroyed or damaged; and shall also, if required, furnish a certificate of the magistrate or notary public (not (77) interested in the claim as a creditor or otherwise, nor related to the insured) living nearest the place of fire, stating that he has (78) examined the circumstances and believes the insured has honestly sustained loss to the amount that such magistrate or notary (79) public shall certify. (80)

The insured, as often as required, shall exhibit to any person designated by this company all that remains of any property (81) herein described, and submit to examinations under oath by any person named by this company, and subscribe the same; and, (82) as often as required, shall produce for examination all books of account, bills, invoices, and other vouchers, or certified copies (83) thereof if originals be lost, at such reasonable place as may be designated by this company or its representative, and shall (84) permit extracts and copies thereof to be made. (85)

In the event of disagreement as to the amount of loss the same shall, as above provided, be ascertained by two competent (86) and disinterested appraisers, the insured and this company each selecting one, and the two so chosen shall first select a competent (87) and disinterested umpire; the appraisers together shall then estimate and appraise the loss, stating separately sound value and (88) damage, and, failing to agree, shall submit their differences to the umpire; and the award in writing of any two shall determine (89) the amount of such loss; the parties thereto shall pay the appraiser respectively selected by them and shall bear equally the (90) expenses of the appraisal and umpire. (91)

This company shall not be held to have waived any provision or condition of this policy or any forfeiture thereof by any (92) requirement, act, or proceeding on its part relating to the appraisal or to any examination herein provided for; and the loss (93) shall not become payable until sixty days after the notice, ascertainment, estimate, and satisfactory proof of the loss herein (94) required have been received by this company, including an award by appraisers when appraisal has been required. (95)

This company shall not be liable under this policy for a greater proportion of any loss on the described property, or for (96) loss by and expense of removal from premises endangered by fire, than the amount hereby insured shall bear to the whole (97) insurance, whether valid or not, or by solvent or insolvent insurers, covering such property, and the extent of the application (98) of the insurance under this policy or of the contribution to be made by this company in case of loss, may be provided for by (99) agreement or condition written hereon or attached or appended hereto. Liability for re-insurance shall be as specifically agreed (100) hereon. (101)

If this company shall claim that the fire was caused by the act or neglect of any person or corporation, private or municipal, (102) this company shall, on payment of the loss, be subrogated to the extent of such payment to all right of recovery by the (103) insured for the loss resulting therefrom, and such right shall be assigned to this company by the insured on receiving such (104) payment. (105)

No suit or action on this policy, for the recovery of any claim, shall be sustainable in any court of law or equity until after (106) full compliance by the insured with all the foregoing requirements, nor unless commenced within twelve months next after the fire. (107)

Wherever in this policy the word "insured" occurs, it shall be held to include the legal representative of the insured, and (108) wherever the word "loss" occurs, it shall be deemed the equivalent of "loss or damage." (109)

If this policy be made by a mutual or other company having special regulations lawfully applicable to its organization, (110) membership, policies or contracts of insurance, such regulations shall apply to and form a part of this policy as the same may (111) be written or printed upon, attached, or appended hereto. (112)

This policy is made and accepted subject to the foregoing stipulations and conditions, together with such other provisions, agreements, or conditions as may be indorsed hereon or added hereto, and no officer, agent, or other representative of this company shall have power to waive any provision or condition of this policy except such as by the terms of this policy may be the subject of agreement indorsed hereon or added hereto, and as to such provisions and conditions no officer, agent, or representative shall have such power or be deemed or held to have waived such provisions or conditions unless such waiver, if any, shall be written upon or attached hereto, nor shall any privilege or permission affecting the insurance under this policy exist or be claimed by the insured unless so written or attached.

In Witness Whereof, this company has executed and attested these presents this 14th day of June, 1893.

This policy shall not be valid until countersigned by the duly authorized manager or agent of the company at Pueblo, Colo.

J. J. GUILE,
Manager of the United States Branch of the Sun Insurance Office.
Countersigned by HENRY O. MORRIS.

246 EXHIBIT 14.

Consists of letters as follows, to-wit:

1893.
July 22—J. F. Bell to Henry O. Morris.
July 24—Henry O. Morris to John F. Bell.
July 25—Henry W. Hobson to Henry O. Morris.
July 28—Henry O. Morris to Henry W. Hobson.
July 26—John F. Bell to Henry O. Morris.
July 29—Henry W. Hobson to Henry O. Morris.
Aug. 15—Henry O. Morris to Trust Company.
Aug. 16—Henry W. Hobson to Henry O. Morris.
Sept. 12—Henry O. Morris to Trust Company.
Sept. 14—John F. Bell to Henry O. Morris.
Sept. 16—Henry W. Hobson to Henry O. Morris.
Sept. 18—Henry O. Morris to Henry W. Hobson.
Sept. 23—Henry O. Morris to Trust Company.
Sept. —Letter from Henry W. Hobson to Henry O. Morris, (Colo. Spgs).
Sept. 26—Henry O. Morris to Trust Company.
Sept. 26—Henry W. Hobson to Henry O. Morris.
Sept. 27—Henry O. Morris to Henry W. Hobson.

As found in testimony of Henry W. Hobson, which see.

Said Exhibits as filed in court are omitted herefrom by consent of the parties, the letters having been read in evidence and appearing in the testimony of Henry W. Hobson.

247 EXHIBIT 15.

Room 43-45 Grand Opera House.
Pueblo, Colorado, Sept. 23, 1893.

Mr. J. R. Gordon to Henry O. Morris, Insurance Agent, Dr.

1893. Term 1/2 Year. Short Rate 1 1/2 per cent.

Date.	No. of Policy.	Name of Company.	Property Insured.	Amount.	Premium.
June 14.	4475189	Sun	Mesa Hotel.	5000	52.50
"	300525	Under.		5000	52.50

As per your request of 22nd inst $105.00

Recd payment 9/27/93 from International Trust Co.

For J. R. GORDON.
HENRY O. MORRIS,
Gen. Agent.

EXHIBIT 16.

Denver, Colo., Sept. 26, 1893.

The International Trust Company. $105.

Pay to the order of Henry O. Morris one hundred and five dollars.

THE INTERNATIONAL TRUST COMPANY,

No. 593. By F. B. GIBSON, Cashier.

Endorsed: HENRY O. MORRIS.

EXHIBIT 17.

* * * * * * *

("Notice of loss from International Trust Company to the Sun Insurance Office; October 12th, 1893").

* * * * * * *

249 EXHIBIT 18.

No. of Policy 4475189. Amount of Policy $5000.00

Proof of Loss
To the
The Sun Insurance Office Insurance Company, of London, England.

By your policy of insurance No. 447,589, issued at, your Agency at Pueblo, Colorado, commencing at 12 o'clock noon, on the 14th day of June, 1893, and terminating at 12 o'clock noon, on the 14th of December, 1893, you insured John R. Gordon, against loss or damage by fire to the amount of five thousand ($5000) dollars according to the terms and conditions printed in said policy, the written portion, together with a correct copy of all endorsements, assignments and transfers being hereto attached marked Exhibit "A". That contemporaneously with the issuance of said policy, there was attached to the same, a separate agreement by which the loss on said policy was made payable to The International Trust Company, or its assigns, a copy of which said agreement is hereto attached marked Exhibit "B", and said policy was made expressly subject to the provision of said agreement.

The total insurance on said property or any part thereof, at the time of the fire including the above mentioned policy, was as claimed by us fifty thousand ($50,000) dollars. For specific details of the same see apportionment schedule of other insurance hereto attached. In reference to this will say, that the claimant under this proof actually holds in its possession the first four policies set out in said schedules, and that as to the other two it has not possession of the same, but with regard thereto, it is claimed that the same were renewals of policies in said companies or other companies which had theretofore been held by the undersigned, and which renewals had been actually made and issued, and it is claimed by the undersigned that it is entitled to hold said insurance companies liable upon such renewal policies. The entire written portion of each of the said additional policies, and all assignments, endorsements and transfers thereon, so far as the same are within the knowledge of this company, are hereto attached marked Exhibit "D".

250 A fire occurred on the 9th day of October, A. D. 1893, at about the hour of ten o'clock A. M by which the property insured was destroyed as herein set forth, the origin of said fire being unknown to this claimant.

The actual cash value of the property thus situated and destroyed under the aforesaid policies at the time of loss, and the actual loss and damage by said fire on the same, for which claim is hereby made, and the whole amount of insurance thereon were as follows:

Property.
The unfinished Mesa Hotel property, in course of construction.

Sound Value.
Said building represented as the undersigned is informed, an expenditure of over $140,000.00 in cash.

Total insurance, as claimed $50,000.00

Loss under insurance.
Practically total loss, there being little or no salvage.

Insured by the Sun Insurance Office, $5000.00.

Claimed on the Insurance Company. Sun Insurance Office, $5000 00.

The undersigned Trust Company claims of the above mentioned Sun Insurance Office Insurance Company, by reason of said loss, damage and policy of insurance, the sum of five thousand ($5000) dollars.

The undersigned Company owns exclusively, in its own right, the debt secured by the deed of trust upon said Mesa Hotel property, and referred to in said policy of insurance in the mortgagee clause thereto attached, and is alone entitled to claim the amount due under said policy and mortgagee clause attached.

At the time of the fire the legal title of said property was in M. D. Thatcher, trustee, for the benefit of the undersigned company, and for the purpose of securing to said company the payment of fifty thousand dollars ($50,000.00). The equity in said property at the time said insurance policy was issued, was in John R. Gordon but since that time, and prior to the fire (as the undersigned claimant is now informed) the said Gordon conveyed said property to the Mesa Hotel Company. Claimant however states and alleges, that it was totally ignorant of
said transfer to said Hotel Company by said John
251 R. Gordon, until after said fire had occurred, and said
claimant had no notice whatsoever of said transfer

The property insured was, so far as claimant's knowledge goes, encumbered to the amount of $50,000.00 by deed of trust to M. B. Thatcher, trustee, to secure the payment to claimant, or its assigns, the sum of $50,000.00.

The destruction of said building was so nearly total, that it is impossible to estimate the value of property saved. All that is left of said building are portions of some of the walls, and the foundation. The salvage may amount to $4,000 or $5,000.

The building insured was not completed, and was not occupied by any one at the time of the fire; the same was in process of construction, and so far as claimant is informed, except as otherwise herein stated, there was no change in the title, use, occupation, location, possession or exposure of said property after the issuing of said policy.

The said fire did not originate by any act, design, or procurement on our part, nor on the part of any one having any interest in the property insured, so far as we are advised, or in the said policy of insurance, nor in consequence of any fraud or evil practice done or suffered by us, or by any other person interested in said property; that nothing has been done by or with our privity or consent to violate the conditions of the policy, as it exists in force for our benefit, or to render it void against us; that we have no knowledge of any act done by, or with the privity or consent of the said John R. Gordon, to violate the conditions of the policy, or render it void, as to him, unless his action in transferring said property to the Mesa Hotel Company was such act, and with regard to the legal effect of said act we are not advised, and of the commission of said act we had no notice, or knowledge, until after said fire had occurred; that no properties are herein mentioned except such as were insured under the policies aforesaid, and that no property or part of said hotel, has been taken away or concealed, and that no attempt to deceive the said Company as to the extent of said loss or otherwise, has in any manner been made.

252 Any other information that may be required will be furnished on call, and considered a portion of these proofs.

It is furthermore understood and agreed that all Exhibits, papers, schedules and statements made by the assured, and attached to this proof of loss, are to be incorporated into this proof, and are hereby duly sworn to and made a part thereof.

Witness The International Trust Company, this 1st day of November, A. D. 1893, its name being signed hereto by its Vice-President, and attested and its seal affixed by its Assistant Secretary.

THE INTERNATIONAL TRUST COMPANY,
[Seal] By HENRY W. HOBSON, Vice Pres.

Attest:

F. B. GIBSON, Asst. Secretary.

* * * * * * *

(Verified).

* * * * * * *

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EXHIBIT C.

Apportionment Blank.

Sun Ins. Office.

Expiration of Policy.	No. of Policy.	Name of Company.	Amount of Policy.	Amount of Insurance.	Amount Pays.
Jany 6-94.........	2085	The Insurance Company of North America......................	$10000 00	$10000 00	$10000 00
Dec 14-93.........	300525	The Hanover Fire Ins. Co. and The Citizens (Fire) Ins. Co. of New York..	$ 5000 00	$ 5000 00	$ 5000 00
Dec 14-93.........	4475189	Sun Insurance Office of London, England..........................	$ 5000 00	$ 5000 00	$ 5000 00
Dec 14-93.........	2316642	Alliance Assurance Company of London, Eng..................	$10000 00	$10000 00	$10000 00
Apr 4-94.........		Do (See proof with regard to this).....	$10000 00	$10000 00	$10000 00
Feb 26-94.........	Not known.	The Norwich Union Fire Insurance Society, England........... (See proof with regard to this.)	$10000 00	$10000 00	$10000 00

The balance of the Exhibits attached to the Proof of 258 Loss as filed in Court, consists of the written portion of the policies of the various other insurances claimed, and are omitted herefrom by consent of the parties.

EXHIBIT 19.

Consists of the following letters and telegrams:

1893.
May 26—Cuyler, Morgan & Co. to Trust Company.
May 29—John F. Bell, to Cuyler, Morgan & Co.
June 2—Cuyler, Morgan & Co. to Trust Co.
June 2—Cuyler, Morgan & Co. to Trust Co.
June 7—John F. Bell to Cuyler, Morgan & Co.
June 12—John F. Bell to Cuyler, Morgan & Co.
June 12—Cuyler, Morgan & Co. to Trust Co. (Telegram).
June 12—John F. Bell to Cuyler, Morgan & Co.
June 12—Trust Co. to Cuyler, Morgan & Co. (Telegram).
June 12—John F. Bell to Guild & Shepherd.
June 12—Trust Co. to Guild & Shepherd. (Cablegram).
May 31—Guild & Shepherd to John F. Bell.
June 13—John F. Bell to Guild & Shepherd.
June 14—Guild & Shepherd to John F. Bell.
June 15—Cuyler, Morgan & Co. to Trust Co.
June 26—Guild & Shepherd to Trust Co. (Cablegram).
June 26—John F. Bell to Guild & Shepherd.
June 28—Guild & Shepherd to Trust Co.
July 21—John F. Bell to Guild & Shepherd.
Aug. 5—Guild & Shepherd to John F. Bell.
Aug. 9—Guild & Shepherd to John F. Bell.
Aug. 22—John F. Bell to Guild & Shepherd.
Sept. 5—John F. Bell ro Guild & Shepherd.
Sept. 22—Guild & Shepherd to John F. Bell.
Sept. 23—John F. Bell to Guild & Shepherd.
Sept. 27—Guild & Shepherd to John F. Bell.

As read into the testimony of Henry W. Hobson, 259 which see. The Exhibits as filed in Court are omitted herefrom by consent of the parties.

EXHIBIT 22.

Information furnished by The International Trust Company to the Sun Fire Insurance Company Office in response to its letter of January 5th, 1894. Such information, however, being furnished without any waiver of the right of The International Trust Company to insist that the information herein given was not required of it under the terms of the policy of insurance held by it, and furthermore, sixty days having expired from time proof was furnished to the company, and no objection having been made thereto, it was too late to require additional proof.

1. In answer to the first, second and third interrogatories of the letter of January 5th, the information called for by these questions is not required by the policy. We respectfully decline to furnish our original checks, drafts, etc., showing the payments to Gordon of the $50,000.00 advanced by us, but will state that the entire amount of the loan, $50,000.00 in cash was actually paid to the said John R. Gordon, prior to the 20th day of December, 1892, part of it being deposited in the State National Bank of this city to the credit of the said Gordon, part being paid to him in the form of checks, New York drafts, etc., and a part being applied on account of commissions, expenses of the loan, etc. Every dollar was paid to the said Gordon or upon his order. Not a dollar of the loan has ever been in our hands since the 20th day of December, 1892, for any purpose, nor to our knowledge has a dollar of it ever been held by anyone else as security, or protection against damages, or loss on any account, or because of litigation over the possession thereof, or title thereto, or any part thereof. There was about $4,000 in the hands of the clerk of the District Court of Pueblo County at one time, deposited as a condition for
260 an injunction against a man named "Hockham" filing a lien. This money, however, as we are informed, was advanced by one of the banks of Pueblo, and has been returned to that bank.

2. In answer to the fourth interrogatory: there is no requirement upon us to furnish the matter called for by your fourth demand, although we would gladly do so if we were possessed of the knowledge, but we have no knowledge whatsoever concerning this matter and it would require a large amount of expense and trouble on our part to obtain it. Under the terms of your policy, you have a right to examine Mr. Gordon under oath, and call upon him to produce his books of account, etc. and he informs us that he shall be glad to furnish the information at any time, in accordance with the terms of the policy. In lieu of this information however, we would refer you to the [affidavite] of Mr. Lang and Mr. Gordon filed herewith, and also to the affidavit and report of W. F. DeCamp. Mr. DeCamp is an experienced builder and superintendent of construction, and a short time before the fire, we, in contemplation of a plan to go ahead and finish the building, employed DeCamp upon the highest recommendations to go there and make a close and thorough estimate of the amount of money represented in the building as it stood, and the amount required to complete it. After a very careful examination of the building he made us the report which we submit.

3. In answer to the fifth, sixth and seventh interrogatories; the loan to Gordon was originally made by The International Trust Company; shortly afterwards it was sold to the Investors Mortgage Security Company, Limited, of Scotland, which Company held the loan up to the 12th day of June, 1893. The loan not being paid at that time, and in fact notice that it would not be paid having been furnished the holder of the note, they became greatly dissatisfied and demanded payment, whereupon we agreed to repay the company the amount of the note $50,000.00 and interest and to repurchase it, which agreement was accepted, and in pursuance of that on the 12th day of June, we ourselves paid the interest up to that date. Whilst the actual reassignment of the note had not yet been made on the 14th day of June, when your policy was issued, yet we considered ourselves the owner of the same from the 12th day of June, and the note was subsequently reassigned to us, and we paid the Investors Company the full amount of the principal $50,000.00 and interest therefor. 261 At the time of the fire we were the actual and sole owners of said note, and had been such from the time we agreed to repurchase it from the Investors Company, and are such at the present time. Our actual interest in said building at the time of the fire, was as holders of the lien for $50,000.00 with interest thereon from the 12th day of June, 1893, Mr. Gordon having arranged subsequently to the 12th day of June to pay us the interest up to that date. The only time that the note has ever been out of our ownership and possession, was for the few months it was held by the Investors Mortgage Security Company Limited aforesaid, which paid the full face value therefor, with interest up to date of payment. I may say in this connection, that since the fire, there has been paid by the Alliance Insurance Company having policy thereon, $10,000.00, which has been applied on the amount due under said note.

4. In answer to the eighth interrogatory, we have no knowledge with regard to the actual financial interest of John R. Gordon in the building at the time the policy was issued, except as shown by the abstracts of title, and his own statements. The abstracts of title show that at that time the legal title of the property stood in the name of Mahlon D. Thatcher, with the equity in John R Gordon, subject to some mechanics liens. We were also informed by Mr. Gordon that he was the owner of said building subject to our mortgage and said liens.

5. In answer to the ninth interrogatory: From an abstract of title which we have had made since the fire, we have ascertained that on or about the 3rd day of July, 1893, the said John R. Gordon made a conveyance of his property to a company

known as The Mesa Hotel Improvement Company. Of this conveyance, however, neither we, nor our trustee, ever had any notice or knowledge whatsoever until after the fire occurred. With regard to the financial interests of Gordon in the building at the time of the fire, it is impossible for us to answer definitely. We have understood from Mr. Gordon that he owned and controlled nearly all, if not all, the stock of the company to which he conveyed the property.

262 6. In answer to the tenth interrogatory, we have no knowledge whatsoever of the Mesa Hotel Improvement Company, or of its interest in the building at the time of the fire, except as shown by the records and the abstract of title which we hold. From the records it appears that the Mesa Hotel Improvement Company held the equity in said building at the time of the fire, but we have no knowledge concerning the financial arrangements concerning the same. This perhaps can be furnished you in full by Mr. Gordon.

7. In answer to the eleventh interrogatory, the International Trust Company holds no securities in addition to the mortgage for loan of $50,000.00 except that subsequently to the fire we brought suit and attached certain equities of Gordon in real estate in Denver and Pueblo, and we have just offered to release the attachment as to the Pueblo property, we being unwilling to keep up the interest on the first liens, and the Denver property is to be foreclosed under first lien, we being unwilling to pay interest on same; and except further that we hold bonds aggregating $50,000.00 conditioned to protect us against mechanics liens upon said building.

8. In answer to the twelfth interrogatory, it is impossible for us to give the information called for by this question, without a great deal of expense and trouble, nor are we called upon so to do by the policy. We would refer you however to the affidavits of DeCamp and others herewith upon this subject. With reference to mechanics liens, judgments, etc., against said building, we have no knowledge except from the records and the abstracts of title which we hold, and which are as follows:

First—On November 26th, 1890, one John Mills, filed a lien upon the lots covered by the former hotel building against the Colorado Coal & Iron Company for $3200. We know nothing about this matter but are informed and believe that said Mills has abandoned the same.

Second—On February 23d, 1893, one W. J. Hockham filed a mechanics lien upon the building and lots against John R. Gordon for $4040.75. We are informed that suit is now pending upon this lien to foreclose the same, but that Mr. Gordon disputes the entire amount and informs us that he expects to defeat the claim of the said Hockham.

263 Third—On March 21st, 1893, one George McSwain, filed a lien on said property for $1649.85. We are informed however, that said McSwain did not commence his suit upon said lien within the time required by law, and the same has been lost.

Fourth—On August 17th, 1893, the Newton Lumber Company filed a lien upon said property for $1332.43 and have since under the statute of Colorado, as we are informed, intervened in the suit brought by Mr. W. J. Hockman and asserted its lien therein.

Fifth—On September 2nd, 1893, the Holmes Hardware Company filed a lien upon said property of $77.22, and we are informed that they have intervened in the Hockham suit.

We have now had the abstract of title brought down to the 12th day of January, 1894, and there are no other liens shown upon the same than as above set out.

We have no notice or knowledge of any other liens, judgments or encumbrances upon property. We are informed that there are a lot of unsettled claims and accounts against the building on contracts which have not been performed, or material supplied, but as to the amount or nature of these we are not informed.

We have no knowledge with reference to what security or obligations are held by claimants against said property for the protection of their claim.

9. In answer to the thirteenth interrogatory, it is impossible for us to answer this interrogatory without great expense, and trouble, and we are not required to do so by the policy. We would, however, refer you to the affidavits of DeCamp and Gordon as to the amount of money represented in the work actually done upon the building at the time of the fire. With reference to the amount of material upon the property and not inwrought into the building, we would also refer you to the affidavit of DeCamp, and we believe that there was no other material than is stated by him. We would, however, in this connection call your attention to the fact that your policy covers "all building materials, supplies and machinery contained in and about the premises, etc."

10. In answer to the fourteenth interrogatory, we herewith file affidavits of William Lang and John R. Gordon, with

264 plans and specifications thereto attached, also showing the value of the work actually done at the time of the fire.

11. In answer to the fifteenth interrogatory, we have no knowledge concerning the keeping of watchmen upon said building, nor were we under any obligations to have such knowledge, or to see to the keeping of watchmen.

12. In answer to the sixteenth interrogatory, we have heretofore filed plans and specifications, and we herewith file certificate of magistrate or notary public.

13. In further answer to your letter of January 5th, and your objections to our proof, we would say that at the time the proof was furnished upon information which we then had, we were satisfied that we held $50,000.00. Since that time we have become convinced that $10,000 insurance which we thought had been made by the Alliance Company could not legally be collected, and that we had no equitable claim against the company therefor, consequently we abandoned that, and now beg leave to correct our proof to that extent.

It is unnecessary to discuss what information or belief your company has with regard to their renewals. We are about to commence suit against companies by whom we claim renewals were issued and who have denied the same.

It is also unnecessary to discuss the question of your understanding where the legal title lies. There can be no question that legally and properly speaking, the legal title to the property was in Mahlon D. Thatcher, trustee, and our proofs fully explain the status of that.

14. In reference to your complaint that we stated that there was no change in the title, use, occupation, etc. of the property, we beg leave to say that inadvertently the word "title" was inserted in this allegation, whereas it should have been omitted, but you could not have been misled by the same, as we fully explained elsewhere the condition of the title.

15. Upon information and belief we allege that the actual cost of the building described was not less than $130,000.00, and that the value of the same at the time of the fire, was not less than $125,000. From inquiry and information, we
265 would furthermore state that the whole of said building was practically destroyed, except as follows:

The two rear walls are standing up to about the second story, but it is impossible to tell how much they are injured, or to what extent they could be used again, until a thorough test is made.

The two front walls are standing up to about the first story above the ground, but we are informed they are badly cracked, and are practically worthless except for what might be gotten from the material.

The foundation of the building is there still, but it is impossible to state its condition, or to what extent it could be used for another building, until it is thoroughly tested.

According to our best information and belief, we do not believe that there is at the outside a [slavage] of over $10,000 or $12,000, admitting that some use might be made of the walls and foundation, or if the matter be considered solely from the standpoint of the value of materials, we do not believe the salvage is over $5,000.

We now believe we have furnished all the additional information called for by you as far as such is practicable, and as fully as we are required to do by your policy.

THE INTERNATIONAL TRUST COMPANY,
By HENRY W. HOBSON,
Vice President.

* * * * * * *

(Verified.)

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266 EXHIBIT 23.

To the Insurance Company of North America, The Sun Insurance Office, The Nanover Fire, and Citizens Fire Insurance Companies:

You will please take notice that we herewith beg leave to correct and amend the proofs of loss heretofore filed by us upon the Mesa Hotel property, Pueblo, Colorado, as follows:

That, whereas, in our original proofs we claimed that we held two policies of the Alliance Assurance Company for $10,000.00 each, making a total insurance as claimed by us of $50,000.00. We now claim only one policy issued by the Alliance Assurance Company for our benefit. At the time the proofs were made, and upon information which we then had, we believed, and so stated that on the 4th day of October, 1893, The Alliance Assurance Company had issued a second policy, and which was in full force and effect at the time of the fire. From information since derived, we are satisfied that we were mistaken, and we have no legal claim against the Alliance Assurance Company upon such policy, and we furthermore beg leave to notify you that The Alliance Assurance Company has paid in full the first policy issued for our benefit, as shown in our proofs.

THE INTERNATIONAL TRUST COMPANY,
By HENRY. W. HOBSON, Vice President.

State of Colorado,
County of Arapahoe.—ss.

Henry W. Hobson, being first duly sworn deposes and says, that he has read the foregoing notice and knows its contents and that the matters and things therein set out are true of his own knowledge, except such matters and things as are stated on information and belief, and in regard to those he verily believes them to be true.

(Seal.) HENRY W. HOBSON.

Subscribed and sworn to before me this 16th day of January, A. D. 1894. My commission expires March 8th, 1897.

FRANK B. GIBSON,
Notary Public.

* * * * * * *

267 ("Exhibits 24 and 25. Affidavits of H. I. Van Keuren, Caleb F. Ray, made respectively January 10, 1894 and January 17, 1894.")

* * * * * * *

268 (Accompanying Exhibits 24 and 25)

Denver, Colorado, Jan. 22d., 1894.

E. P. Piper. Esq.,
Gen'l. Agent Sun Fire Office,
4th Floor Ernest & Cranmer Building, City.

Dear Sir:—

As I suggested to you there was some question with reference to what Notary was nearest the Mesa Hotel within the meaning of the policy of the Sun Insurance Office. I accordingly to make sure obtained the certificates of two notaries, one of whom certainly lives nearest the hotel. One I furnished you recently, and now I enclose a certificate of the other Notary, which was obtained as soon as possible, he having been absent. 269

Very truly yours,

HENRY W. HOBSON, V. Pt. G.

EXHIBIT 26.

Consisting of those portions of the Proofs of Loss of John R. Cordon, introduced in evidence, and appears in bill of exceptions. Read into evidence by counsel for defendant on page —. Said Exhibit is omitted herefrom by consent of the parties.

EXHIBIT 32.

This is the portion of the abstract of title introduced in evidence by defendant and shows that the title and interest of John R. Gordon in said property was on July 3, 1893, transferred and conveyed to The Mesa Hotel & Improvement Company by deed of that date, recorded on July 3, 1893, as shown by the extracts read by counsel from said abstract on page 104. The Exhibit itself is omitted herefrom by consent of the parties.

EXHIBIT 37.

N. Y. Standard.

Mortgagee Clause with full Contribution.

Loss or damage, if any, under this policy, shall be payable to ——— as ——— mortgagee (or trustee) as interest may appear, and this insurance as to the interest of the mortgagee (or trustee) only therein, shall not be invalidated by any act or neglect of the mortgagor or owner of the within described property, nor by any foreclosure or other proceedings,
270 [nor by any foreclosure or other proceedings] or notice
of sale relating to the property, nor by any change in the title or ownership of the property, nor by the occupation of the premises for purposes more hazardous than are permitted by this policy; provided, that in case the mortgagor or owner shall neglect to pay any premium due under this policy, the mortgagee (or trustee) shall, on demand, pay the same.

Provided, also, that the mortgagee (or trustee), shall notify this company of any change of ownership or occupancy or increase of hazard which shall come to the knowledge of said mortgagee (or trustee) and, unless permitted by this policy, it shall be noted thereon and the mortgagee (or trustee), shall, on demand, pay the premium, for such increased hazard for the term of the use thereof; otherwise this policy shall be null and void.

This company reserves the right to cancel this policy at any time as provided by its terms, but in such case this policy shall continue in force for the benefit only of the mortgagee (or trustee) for ten days after notice to the mortgagee (or trustee) of such cancellation and shall then cease, and this company shall have the right on like notice, to cancel this agreement.

In case of any other insurance upon the within described property this company shall not be liable under this policy for a greater proportion of any loss or damage, sustained than the sum hereby insured bears to the whole amount of insurance on said property issued to or held by any party or parties having an insurable interest therein, whether as owner, mortgagee or otherwise.

Whenever this company shall pay the mortgagee (or trustee), any sum for loss or damage under this policy and shall claim that, as to the mortgagor or owner, no liability therefor existed, this company shall, to the extent of such payment, be thereupon legally subrogated to the rights of the party to whom such payment shall be made, under all securities held as collateral to the mortgage debt, or may at its option pay to the mortgagee (or trustee) the whole principal due or to grow due on the mortgage with interest, and shall thereupon receive a full assignment and transfer of the mortgage and of all such other securities; but no subrogation shall impair the right of the mortgagee (or trustee) to recover the full amount of
271 ——— claim Dated ———

Attached to and forming part of Policy No. ———
Western Assurance Company.

EXHIBIT 38.

Denver, Col., January 5, 1894.

To The International Trust Company, Denver, Colorado, and
John R. Gordon, in care of The International Trust
Company, Denver, Colorado.

Gentlemen:

There was recently received by the Sun Insurance Office, documents purporting to be a notice of loss and statement thereof, setting forth a claim against said Company under a policy numbered 4475189.

The said Sun Insurance Office now begs to advise you that, after careful examination of the documents referred to, it finds them so apparently incorrect and incomplete that they cannot be accepted as complying with the terms and conditions of the policy of insurance; that this Company is unable to ascertain from the said documents whether or not it is indebted to the claimants for any loss under said policy, or if indebted to what amount and to whom so indebted.

For your more particular information this Company begs to refer to the following several points in which the said documents appear incorrect or incomplete.

First—The said documents appear to claim that there was at the time of the alleged fire, the sum of ($50,000) fifty thousand dollars of insurance on the building described as the "Mesa Hotel," when the Company has reason to believe that there was not that amount of insurance.

Second—Said documents claim that certain policies named were "renewals of policies in said companies, or other companies which had heretofore been held by the undersigned and which renewals had been actually made and issued," when this Company has reason to believe that this statement is not correct, that certain of the policies named were not so issued and were never issued to or held by claimants.

272 Third—Said documents appear to claim that "the legal title of said property, at the time of the fire, was in M. D. Thatcher, trustee, for the benefit of the undersigned Company, when, in fact, and in the common and accepted use of the term legal title and in the sense in which it is used in a policy of insurance, said "legal title" was not in M. D. Thatcher, Trustee, but was in The Mesa Hotel Company," a corporation incorporated under the laws of the State of Colorado.

Fourth—Said documents claim that "there was no change in the title, use, occupation, location possession or exposure of said property after the issuing of said policy," when this Company has reason to believe, from public records and from admissions by claimants, that there had been an absolute and legal conveyance of the title to said property by the party represented to own it when said policy was issued and insured thereunder, to another party, without notice of such conveyance to this Company, or endorsement thereof upon the said policy and that there had also been a change in the use and occupation of the said building, to the great change and increase of the hazard or danger of fire.

Fifth—Said documents do not appear to state, as they should the interest of the insured and of all others in the property.

Sixth—Said documents do not appear to state the actual interest of claimants in the said property.

Seventh—Said documents claim that "the undersigned Company owns exclusively, in its own right, the debt secured by the deed of trust upon said Mesa Hotel property and referred to in said policy of insurance in the mortgagee clause thereto attached, and is alone entitled to claim the amount due under said policy and mortgagee clause attached;"

but it does not state the actual amount of said debt or show that the amount thereof is such as to equal the amount claimed as due under the said policy.

Eighth—The said documents do not appear to state, as they should, the actual cost of the building described.

Ninth—The said documents do not appear to state, as they should, the actual cash value of the said building at the time immediately before the fire.

Tenth—The said documents do not appear to state, as they should, the actual loss and damage to the building described, or the actual value of what remains of it.

Eleventh—The said documents do not appear to state, as they should, all the encumbrances on the said property.

Twelfth—Said documents state

273 "That nothing has been done by or with our privity or consent to violate the conditions of the policy as it exists in force for our benefit, or to render it void against us; that we have no knowledge of any act done by, or with privity or consent of said John R. Gordon, to violate the conditions of the policy or to render it void, as to him, unless his action in transferring said property to the Mesa Hotel Company was such act."
when this Company has reason to believe that this statement is not correct for several reasons, one of which being that, the said International Trust Company, having agreed with this Company to have a night and day watchman kept constantly on duty on the premises as a condition to the continuance in force and effect of said policy, said International Trust Company failed to keep such watchmen constantly on duty and said failure was with the privity or consent of said International Trust Company or said John R. Gordon, or both of them and this company has reason to believe that such failure to keep watchmen constantly on duty was an act in violation of the conditions of said policy.

For each of the several reasons hereinbefore stated this Company considers the said documents incorrect and incomplete and on account of each, it rejects the said documents and declines to accept them as notice and satisfactory proof of the loss claimed under the said policy.

In the documents referred to you offer to furnish any other information that may be required and in accordance therewith this Company requests that you furnish to it

First—The originals, or certified copies, if the originals be lost, of any and all checks, drafts, orders and vouchers showing when, where, through whom and how any and all advancements of said loan of $50,000, or any part thereof, was paid over by said International Trust Company to said John R. Gordon.

Second—Statement of how much of said loan of $50,000 was paid to said Gordon previous to the fire referred to, with the date and amount of each payment thereof.

Third—Statement showing how much if any portion of said loan or money held in lieu thereof is imploded or held in either your own hands or the hands of any one else as security or protection against damages or loss of any account, or because of litigation over the possession thereof, title thereto, or any part thereof.

274 Fourth—The original or certified copies of all written contracts and sub-contracts and memoranda of all oral contracts and sub-contracts and estimates and payments made and claimed on account of each and all thereof, in the furnishing of any and all labor, materials and supplies inwrought in the construction and erection of said building and every part thereof as it stood immediately before the said fire, names of parties, dates and amounts requested in detail.

Fifth—Full statement showing the actual financial interest of said International Trust Company in said building at the time said policy was issued.

Sixth—Full statement showing the actual financial interest of said International Trust Company in said building at the time of said fire.

Seventh—Full statement showing whether or not the debt secured by trust deed referred to was at any time owned by any other party than the said International Trust Company and if so owned, by whom and for what actual consideration and if so owned and recovered by the said Trust Company, from whom purchased and for what actual amount paid.

Eighth—Full statement showing the actual financial interest if any, of John R. Gordon in said building at the time said policy was issued.

Ninth—Full statement showing the actual financial interest if any, of John R. Gordon in said building at the time of the fire.

Tenth—Full statement showing the actual financial interest of The Mesa Hotel Company in said building at the time of the fire.

Eleventh—Full statement of any and all securities held by said International Trust Company, in addition to mortgage, for said loan of $50,000.00.

Twelfth—Full statement showing the names of any and all parties having claims for money due on account of materials or labor, inwrought into said building, of all mechanics' liens, judgments, suits now pending or of unsettled accounts against said building, with the amount of each and every such
275 claim and statement showing what security or obligation has been entered into or what moneys, if any, are now held by claimants or any other parties for the protection or payment of any such claims when due.

Thirteenth—Full statement, showing in detail the actual quantity, quality and cost of each and every kind of material inwrought into the construction of said building, and statement, in detail, of the amount and actual cost of labor performed in such construction up to the time of the fire, together with a statement in detail of the quantity, quality and cost of all materials and labor performed thereon, intended for use in said building before its completion, but, at the time of the fire, not then on the premises of the said Mesa Hotel and not inwrought into the building.

Fourteenth—Full detail plans and specifications of the said building, as actually constructed, with full statement showing the actual amount of work done thereunder, previous to the fire.

Fifteenth—Statement as to the keeping of watchmen at the said building, giving names of persons so employed as watchmen, the time of their employment and when such employment was discontinued.

This Company also requests, in accordance with the terms and conditions of its policy, that it be furnished with complete and verified plans and specifications of the said Mesa Hotel building; and also with a certificate of the magistrate or notary public (not interested in the claim as a creditor or otherwise, not related to be insured) living nearest to the place of fire stating that he has examined the circumstances and believes the insured has honestly sustained loss to the amount that such magistrate or notary public shall certify.

Should it appear that other information than that already submitted or called for herein, is desired by this Company in connection herewith, the Company will be glad to hereafter avail itself of your offer to furnish the same.

Very Respectfully,

THE SUN INSURANCE OFFICE,
By EDWIN P. PIPER, Gen'l Agt.

276 EXHIBIT 39.

Denver, Colorado, Oct. 26th, 1893.

Henry O. Morris, Agent, The Sun Insurance Office Insurance Co. of London, England, The Hanover Fire Insurance Company, The Citizens (Fire) Insurance Company of New York.

Dear Sir:—

Referring to the fire on the Mesa Hotel property in Pueblo, and of which we gave each of the above companies represented by you notice, we have been waiting for over two weeks to see what action would be taken by your companies with reference to the settlement and adjustment of the losses claimed upon said hotel. Has any adjuster representing your companies, or any of them, been here, and if so, may I ask what action has been taken, and if no adjuster has been here will you please advise me when you expect one representing any of the companies? We are prepared to have proof made according to the terms of the policies, and are advised that it is the custom of agents to make out proofs for the claimants whether they propose to dispute the liability or not. We, of course, are prepared to have proofs prepared ourselves if you do not wish to attend to it. We also believe it is customary for agents to furnish blank forms for proof in order to serve the convenience of the insurance companies, and if you do not wish to attend to the making out of the proofs, may I ask that you will at once send us forms of proof for each of the above companies, so that we can proceed to take the necessary steps?

I do not understand that any action of yours in the above respect prejudices your company in any way, and without regard to the question of your liability, we will be extremely obliged if you will give immediate attention to this matter, answering our questions as above set out, and offering us what facilities you can in the way of making proof of loss.

Very truly yours,

HENRY W. HOBSON,
Vice President.

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277 EXHIBIT 40.

Denver, Colorado, February 21st, 1894.

The International Trust Company,
Denver, Colorado.

Gentlemen:—

We herewith tender you $72.21, in gold and silver coin of the United States; $52.50 of which is the amount of premium paid upon policy No. 4475189 of The Sun Insurance Office of London upon the "Mesa Hotel" property dated the 14th day of June, 1893, and the sum of $19.71 the amount of costs accrued at the time of this tender in the cause in the Circuit Court of the United States for the District of Colorado, entitled The International Trust Company, plaintiff, vs. the Sun Insurance Office, defendant; the purpose of this tended is for the recission of the contract of insurance as evidenced by said policy No. 4475189 of this Company upon the Mesa Hotel property situated at Pueblo, Colorado, because at the time of its issuance you had no insurable interest in said property, and because the premium was demanded and accepted from you in total ignorance that at the issuance of said policy you had no insurable interest therein. You will therefor- deliver up to us the said policy No. 4475189 for cancellation.

Yours Respectfully,

SUN INSURANCE OFFICE,
By EDWIN P. PIPER,
Gen'l Agent.

EXHIBIT 41.

Denver, Colorado, Jan. 12th, 1894.

Edwin Piper, Esq.,
Gen'l. Agent Sun Fire Office,
Denver, Colo.

Dear Sir:—

In answer to your letter of Jan. 5th, addressed to this company, I beg leave to say that we cannot recognize it so far as Mr. John R. Gordon is concerned. Our claim is entirely independent of that of Mr. Gordon, and we made our proofs 278 entirely independently of him, and our rights are in no wise dependent upon his rights; or his status with your company. We therefore decline to recognize the demand for further information except to the extent, that it is made upon us.

You address your letter to The International Trust Company and John R. Gordon in care of The International Trust Company, Mr. Gordon has no connection with our company, does not get his mail here, and we cannot undertake to be responsible for communications addressed to him in our care.

With the understanding that we only answer for ourselves, I herewith submit to you statement under oath, and papers accompanying the same as follows:

1st. A detailed answer on the part of this company, under oath.

2nd. A certificate of Notary. In this connection I would say that there is some question as to which of the two notaries is nearest the building. We furnish a certificate of one, and have sent for certificate from the other, who formerly made a certificate for the Alliance Company, and we therefore investigated the facts. He is now East, and it may be some little while before we get his certificate.

3rd. The affidavit and accompanying papers by W. F. DeCamp.

4th. The affidavit of William Lang.

5th. The affidavit of John R. Gordon.

6th. Copy of specifications upon the Mesa Hotel, marked Exhibit B.

7th. Copy of brick work specifications, marked Exhibit D.

8th. A roll of plans marked Exhibit A and H, containing 19 sheets of blue prints.

9th. A roll of blue prints marked Exhibit C, E, F and G, containing four sheets.

We have taken a great deal of trouble and pains to supply this information, and I trust it is satisfactory. We are inclined to give your Company every facility possible for the full consideration of this case, and I trust that after examination, you will recognize the equity and justice of our claim. If the information now furnished you is not satisfactory, please state wherein it is unsatisfactory.

279 In this letter I again desire to say that we furnish this information gratuitously without the recognition of any obligation upon us, and without any waiver of our rights to insist that the information is not called for by your policy, and that you made the demand too late.

Very truly yours,

HENRY W. HOBSON,
Vice-President.

EXHIBIT 42.

This is a lot of papers consisting of affidavits of William Lang, John R. Gordon and William DeCamp; specifications of Mesa Hotel, and plans thereof, mentioned in Exhibit- 22 & 41, and are in no wise material to the issues of this case, and are therefore omitted.

EXHIBIT 43.

Pueblo, Colo., Oct. 27th, 1893.

Henry W. Hobson, Esq.
Vice-President International Trust Co.
Denver, Colo.

Dear Sir:

Mr. Beaumont has just handed me your esteemed favor of 26th inst. and I think, after reading same, that an explanation is due you.

Your favors of recent date giving official notice of the fire which destroyed the Mesa Hotel, was by me referred to officers of the several companies, for them to answer, and I confess to a feeling of surprise that you have not heard from them ere this. As I am only the local agent of the several companies in my office, which are involved in this fire, I would prefer you address your communications to the companies direct, thinking thereby to facilitate final action. I regret exceedingly
that I have been seemingly discourteous as I certainly
280 [has] no such intention. I would suggest you write to
Mr. E. P. Piper, General Agent of Sun Insurance Office of London, and T. A. Fisher, State Agent Underwriters Agency. Mr. Piper resides in Denver and Mr. Fisher in Omaha, Neb.

Trusting I have sufficiently explained matters, as regards myself, and my seeming negligence, I beg to remain,

Yours very respectfully,

HENRY O. MORRIS,
Gen'l Agt.

EXHIBIT 44.

Denver, Colorado, Oct. 28, 1893.

Henry O. Morris, Esq.,
Pueblo, Colo.

Dear Sir:—

Your favor of Oct. 27th duly received and I beg leave to acknowledge the courtesy of your reply, and I will act upon your suggestion in regard to communicating with T. A. Fisher and Mr. Piper.

Yours Very Truly,

HENRY W. HOBSON,
Vice-President.

EXHIBIT 45.

Denver, Colorado, Jan. 22d, 1894.

E. P. Piper, Esq.
Gen'l. Agent Sun Fire Office,
4th Floor Ernest & Cranmer Building, City.

Dear Sir:—

As I suggested to you there was some question with reference to what Notary was nearest the Mesa Hotel within the meaning of the Policy of the Sun Insurance Office. I accordingly, to make sure, obtained the certificate of two notaries, one of whom certainly lives nearest the hotel. One I furnished you recently as soon as possible he having been absent.

Very truly yours,

HENRY W. HOBSON, V. Pt. G.

281

EXHIBIT 46.

Denver, Colorado, Feb. 14, 1894.

Edwin P. Piper, Esq.,
Gen'l. Agent Sun Insurance Office,
Ernest & Cranmer Bldg., City.

Dear Sir:—

Your letter of Feb. 21st duly to hand, and we decline to receive any amount in settlement of policy held by us upon the Mesa Hotel, except the full amount claimed. We suppose your company would like to rescind the contract on any ground that it can get. In reference, however, to your statement that we have no insurable interest in the property, and that the premium was demanded and accepted in ignorance thereof, we beg to say that it is absolutely without any foundation in fact or law. Your request that we deliver up your policy for cancellation is most respectfully declined, and as you seem to desire to force an issue, we will let the courts decide whether you are liable to us or not.

Very truly yours,

JOHN F. BELL, Sec'y.

42

EXHIBIT "A."

282 John R. Gordon, Pueblo, Colo.

Loan No. 541.
Amount $50.000.
Maturing June 12, 1893.

Int. 7 p. c. per annum
Payable semi-annually.
Due 1750 June 12, 1893.

Valuation Ground 50,000
Imp. 200,000

DESCRIPTION OF PROPERTY.

Insurance $60,000.00

Lots 11 to 16 incl. Block #126 South Pueblo, with six story and basement, stone brick and iron hotel to be known as the Hotel Mesa.

Date Dec 12 1892.

Date Due.		Interest.	Principal.	Date Paid.		Interest.	Principal.
	[Transferred to	Page No. 375	Loans for	"Acct"]			
Repurc	hased of Investors	Mortgage S	ecurity Co	Ld 12 June 1893.			
1893 Sept 12	To amount due	1,250		1893 Sept 25	By Cash 7%	875	
				1894 Jan 17	3%	375	
1894 Jan 12	4M at 10%	1,666 67		17	10%	1,666 67	
12			6,034 58	17			6,034 58
	$500.00 5 days at 10%						
July 12	43965 176 " " 10%	2,188 40		1895 Feb 20 at 8% after allowing rebate			
1895 Feb 20	do " 10%	2677 88		of $333.34 on 17" Jany payment 3559 68			

(Note.—The portions shown in red ink are in pencil marks in the original.)

(NOTE.—The portions shown in red ink are in pencil marks in the original.)

283 EXHIBIT "B." 375

John R. Gordon,
Board of Trade Bldg, Pueblo, Colo.

Loan 1026 Amount $50,000.00 Maturing June 12, 1893.	"For acct." Investor's Mortgage Security Co.	10% from 12 June 1893 Int 7 p. c. per annum. Payable Semi-annually Due $1750.00 June 12, 1893.

Valuation Ground $ 50,000.00
Improvements 200,000.00

50,000
Insurance ~~60,000.00~~

DESCRIPTION OF PROPERTY.

Lots 11 to 16 inclusive Block #126, South Pueblo (Colo) with six story and basement stone, brick and Iron Hotel to be known as The Hotel Mesa.

Date Dec 12 1892.

Date Due.		Interest.	Principal.	Date Paid.		Interest.	Principal.
1893 June 12	To amount due	1750		1893 June 12	By Cash	1750	
	Int. due by us under				Int. paid by us		
Sept 12	Interest due by us	under 875		Sept 25 Inter	est paid by us und	er 875	
	our repurchase				under our repurchase		
	our repurchase	2625			our repurchase	2625	
Repurchased	from Investors M	ortgage Sec	urity Co Ld	12 June 1893, and carri	ed back to page 42	loan No 541.	
Repurchased	from Inv. M. Sec.	Co., June 12	1893, and ca	rried back to p. 42, loa	n 541.		

(NOTE.—The portions shown in red ink are in pencil marks in the original.)

284 And for as much as the above and foregoing do not fully appear of record in the above cause, the defendant tenders herewith its bill of exceptions and prays that the same may be received and made a part of the record in said cause. Which is accordingly done this 4th day of May, A. D. 1895.

JOHN A. RINER, Judge.

Approved: A. C. CAMPBELL,
Atty. for Plaintiff.

(Indorsed)—No. 3061. The International Trust Company vs. The Sun Insurance Office. Bill of Exceptions. Filed May 6, 1895. Bobert Bailey, Clerk U. S. Circuit Court.

* * * * * * *

289 In the United States Circuit Court of Appeals for the Eighth Circuit.

In Error to the Circuit Court of the United States, for the District of Colorado.

The Sun Insurance Office, Plaintiff in Error,
vs.
The International Trust Company, Defendant in Error.

ASSIGNMENTS OF ERROR.

Now comes the plaintiff in error, The Sun Insurance Office, and says that in the record and proceedings in the above entitled cause in the Court below there is manifest error, in this; to-wit:—

I.

The Court below erred in overruling the demurrer of the defendant to plaintiff's amended complaint.

II.

The Court below erred in overruling the objection of the defendant Company to the introduction of any evidence in this cause at the time of the trial thereof, because the amended complaint does not state facts sufficient to constitute a cause of action against defendant Company.

III.

The Court below erred in overruling the objection of the defendant Company by its counsel to witness Hobson stating the contents of a letter written to John R. Gordon by The
290 International Trust Company to the effect that he, as
vice-president of the International Trust Company had notified Mr. Gordon that the International Trust Company had

concluded to take up the Gordon loan, because it is immaterial and not evidence of the repurchase of said loan, and the letter, itself, should have been produced.

IV.

The Court erred in overruling the objection of defendant by its counsel, to the following question asked witness Hobson on direct examination:

Now, calling your attention, Mr. Hobson, to the letter of June 13th, I notice you use this expression in this letter:

"You need not have the least anxiety about this loan or security, for whilst we do not legally guarantee any loans, we always stand back of our correspondents and protect them, and at any time we would rather take up a loan than to have them dissatisfied."

I would ask you to explain what you meant by that sentence? because the same is immaterial and his letter must show for itself what he meant.

V.

The Court below erred in permitting witness Gordon on his direct examination to testify over the objection of the defendant by its counsel, as to the value of the property and the amount of loss because the policy provides that that must be determined by an arbitration or appraisement as a condition precedent, and it is incompetent to bring into this action the value, independent of an appraiseme-t, unless it be shown that the appraisement was waived.

291 VI.

The Court below erred in admitting in evidence over defendant's objection, and in denying defendant's motion by its counsel to strike the answer of witness Gordon as to the amount of money which had been expended upon the building before it was burned down.

VII.

The Court below erred in permitting the witness DeCamp to testify over the objection of the defendant by its counsel, as to the amount and extent of the loss and the value of the property destroyed, upon the ground that the only competent evidence thereof is an appraisement or an agreed ascertainment of the loss between the parties.

VIII.

The Court below erred in sustaining the objection of the plaintiff by its counsel to the [officer] of the defendant to prove by witness Benson on direct examination what was the usage relative to the use of the mortgage clause—as to the form of the mortgage clause which is used; and to the offer to show that the mortgage clause used in this particular case is not the mortgage clause which is used in current underwriting with respect to certain particulars which are material to the issues; and that the clause was prepared by the International Trust Company with respect to those particulars. 292

IX.

The Court below erred in refusing to admit the evidence contained in the offer of the defendant to show by witness Lamey in what respect the mortgage clause attached to the policy in suit differs from the standard mortgage clause.

X.

The Court below erred in refusing to admit the evidence contained in the offer of the defendant to show by witness Lamey that the words "Mortgagee" and "trustee," as used in the union or standard mortgage clause, are used by underwriters in current underwriting throughout a large territory covering a number of States, in which a variety of forms of securities are used; in some States, mortgages, and in others, trust deeds; and that this mortgage clause is prepared with reference to use in a variety of States and circumstances. That the word "mortgagee," is used in case of a mortgage, and "trustee" in case of a trust deed, according to the security used, and the other is either superfluous or is erased according to the circumstances and the nature of the securities.

XI.

The Court below erred in refusing to admit the evidence contained in the offer of the defendant to prove by the witness Lamey that the current practice in underwriting with reference to trust deeds and the "loss payable" clause, where the loss is made payable for the benefit of the holder of the securities, is to make the loss payable to the trustee; that in respect to this policy, the mortgage clause in question differs from the union mortgage clause in current underwriting in that it is made payable directly to the trust Company. 293

XII.

The Court below erred in permitting the plaintiff Company to introduce in evidence, over the objection of the defendant Company, the affidavits of William Lang, John R. Gordon, and William DeCamp; and also blue prints of the plans of the building and the specifications of the building, upon the ground that they are immaterial, improper, incompetent, and not the best proof of the facts they contain.

XIII.

The Court below erred in denying the motion of the defendant Company by its counsel at the conclusion of the testimony, for a finding and judgment in favor of the defendant Company, upon the ground that the evidence is insufficient to show a cause of action in favor of the plaintiff Company or to support a finding for the plaintiff Company, or to support a judgment to be entered upon such finding for the plaintiff Company.

XIV.

The Court below erred in refusing the request of the defend-
ant Company for the Court to rule as a matter of law
294 upon the evidence that from the correspondence between
the International Trust Company and the Investors
Mortgage Security Company, Limited, relative to the re-
purchase of the Gordon note by the International Trust Com-
pany, which is in evidence, and from all the evidence and tes-
timony relating thereto, the ownership and title to said Gordon
note did not vest in the International Trust Company until
after the issuing of defendant's policy.

XV.

The Court below erred in ruling that the ownership in and title to the said Gordon note did vest in the International Trust Company prior to the issuance of defendant's policy.

XVI.

The Court below erred in refusing the request of the defendant Company for the Court to rule as a matter of law upon all the evidence that the International Trust Company did not have an insurable interest in the property or in the indebtedness at the time of the issuing of defendant's policy.

XVII.

The Court below erred in ruling that the International Trust Company did have an insurable interest in the said property and indebtedness at the time said policy was issued.

XVIII.

The Court below erred in refusing the request of the defend-
ant Company for the Court to rule as a matter of law based
upon all the evidence that the International Trust Com-
295 pany did not have such an insurable interest either in
the property or in the indebtedness as was sufficient in

law to sustain the policy, and did not have the insurable interest required by the terms of the policy and mortgage clause.

XIX.

The Court below erred in ruling that the International Trust Company did have the interest in the property and indebtedness required by the terms of the policy and mortgage clause.

XX.

The Court below erred in making its special findings of fact' on the ground that said findings and neither of them are supported by the evidence.

XXI.

The Court below erred in making the sixth special finding: viz:

"That on the 12th day of June, 1893, when the loan of the said John R. Gordon became due and payable, he being unable to pay the same, and the holder of his said note demanding payment, The International Trust Company, by its Executive Committee, determined to re-purchase said loan and authorized the officers of said Company to so re-purchase it:"
for the reason that there is no evidence to support said finding.

XXII.

The Court below erred in making the seventh special
296 finding, viz.,

"That in pursuance of such authority, the International Trust Company did on the 12th day of June, 1893, reacquire title to the said note of John R. Gordon by re-purchase, and did re-acquire an insurable interest in and to the property covered by the policy of insurance issued by the defendant Company. That the said Trust Company did on the 12th day of June, 1893, actually pay to the Investors Mortgage Security Company the sum of $1750, being the part of the amount due upon re-purchase, and did assume the payment of the balance of the purchase price; viz , $50,000; and did from that time on treat and dispose of said note as its own property. That although said note has never been foreclosed, no definite extension of the same has ever been given, and the same has remained in default ever since the 12th day of June, 1893;"
in that said finding is not supported by the evidence, and in that said special finding of fact as to the ownership of the said Gordon note is a conclusion of law from the evidence, and not a finding of fact, and because the finding that the International Trust Company had an insurable interest at the time of the

issuing of the policy is a conclusion of law and not a finding of fact, and because it was shown by the evidence that the entire negotiations relating to the purchase of the Gordon note by the International Trust Company were conducted by correspondence, which is in evidence and fully set forth in the record; and that said correspondence and all of the evidence relating thereto, shows as a matter of law that the ownership in and title to the said note was not acquired by nor vested in the International Trust Company at the time the policy of defendant Company was issued; and because said correspondence 297 and all the evidence relating thereto, shows as a matter of law that the International Trust Company did not have at the time said policy was issued a valid, legal, or sufficient insurable interest in the property or indebtedness to support the policy and mortgage clause, and did not have the insurable interest required and called for by the policy and mortgage clause. And because no evidence to establish said finding was produced in the Circuit Court.

XXIII.

The Court below erred in making the eighth special finding, viz.:

"That by agreement between The International Trust Company and the said Investors Mortgage Security Company, the International Trust Company was given time wherein to make the payment of the balance of $50,000 upon the re-purchase price, as aforesaid, and it did thereafter pay said amount in full to the Investors Mortgage Security Company with interest thereon at the rate of 7 per cent from June 12, 1893, to September 12, 1893, and at the rate of 9 per cent from September 12th to date of payment."

XXIV.

The Court below erred in making the twelfth special finding, and especially that portion of the said finding as follows, viz.,

"The agent of defendant Company in issuing said renewal dealt directly with the International Trust Company and with the understanding and knowledge that such policy of 298 insurance with mortgage clause attached was issued for the benefit and protection of said Trust Company; That furthermore, after the 14th day of June, 1893, and prior to the time when the property insured was destroyed by fire, the agent of defendant Company dealt directly with the International Trust Company, and it was understood that said policy of insurance was in existence and was being carried for the benefit and protection of the International Trust Company as the owner of the said note of John R. Gordon;"

for the reason that there is no evidence to support either the said portion of the said finding or said finding in its entirety.

XXV.

The Court below erred in making the eighteenth finding of fact, and particularly that portion thereof as follows, viz.,

"Said proofs of loss were in accordance and complied with the requirements of the provisions of the policy of insurance aforesaid:"

in that there is no evidence to support either said portion of said finding or the finding in its entirety, and the evidence shows that on December 6, 1893, January 12, 1894, and January 16, 1894, amendatory and supplemental proofs were furnished by the plaintiff Company.

XXVI.

The Court below erred in making the twentieth special finding of fact, and especially that portion thereof as follows; viz.,

"That the mistake aforesaid was made in good faith and inadvertently and was immaterial, and did not in any wise affect the validity of the original proofs as filed, and did not in
any wise prejudice defendant Company in its determina-
299 tion as to the payment or refusal of payment of said
policy;"

for the reason that there is no evidence to support said portion of said finding.

XXVII.

The Court below erred in making that portion of the twenty-first special finding of fact; viz.,

"That defendant Company, by all of its actions and conduct from the time of said fire or shortly after, denied its liability under said policy upon grounds foreign to the matter of proofs of loss, and arising out of transactions occurring before the fire. And the defendant Company did, by and through its agents, prior to the bringing of suit in this action, deny its liability under said policy upon the grounds and matters arising prior to the destruction of the said hotel property;"

for the reason that there is no evidence to support said portion of said finding.

XXVIII.

The Court below erred in making the twenty third special finding; viz.,

"That suit was begun by the International Trust Company against the defendant Company on the 16th day of February,

1894, more than sixty days after the proofs of loss had been furnished by the International Trust Company to defendant Company;"
because there is no evidence to sustain the finding that sixty days had expired from the time of the furnishing of proofs of loss, before suit was begun.

XXIX.

300 The Court below erred in finding as a matter of law, as contained in its twenty-fourth special finding, that the plaintiff Company is entitled to a judgment against the defendant Company under said policy.

XXX.

The Court erred in refusing to make the substitute and each and every thereof requested by defendant Company in lieu of the findings made by the Court.

XXXI.

The Court below erred in not substituting for the fourth finding made by the Court, the substitute requested by the defendant, viz.,

"That on or about the 29th of December, 1892, The International Trust Company sold and transferred and endorsed without recourse to the Investors Mortgage Security Company, Limited, of Scotland, said note of John R. Gordon, and of the sale and transfer of said note, no notice was ever given to defendant Company;"
because there is no evidence to support the finding made by the Court, and because the evidence shows the facts to be as defendant requested the Court to find:

XXXII.

The Court below erred in not substituting for the fifth special finding made by the Court the substitute requested by the defendant Company; viz.,

301 "That prior to the 12th day of June, 1893, the said Investors Mortgage Security Company, Limited, of Scotland, had transmitted the Gordon note to the International Trust Company for collection; the same being received for collection on June the 7th, 1893; and said Investors Company had informed the International Trust Company that on the repayment of the Gordon loan on the 12th of June, they should require the money at their Bankers in New York; and the Trust Company thereupon on the 12th day of June so notified the said John R. Gordon;"

because the evidence shows the facts to be as defendant requested the Court to find.

XXXIII.

The Court below erred in not substituting for the tenth special finding made by the Court the substitute requested by the defendant Company, because there is no evidence to support the finding made by the Court and the evidence shows the facts to be as defendant requested the Court to find.

XXXIV.

The Court below erred in not substituting for the twelfth special finding made by the Court, the substitute requested by the defendant Company, because there is no evidence to support the finding made by the Court, and the evidence shows the facts to be as defendant requested the Court to find; and

XXXV.

The Court below erred in not substituting for the fifteenth special finding made by the Court the substitute requested by the defendant; viz., 302

"That on the 26th day of September, 1893, the said John R. Gordon, not having paid the premium on the policy issued on June 14, 1893, as aforesaid, and said Gordon having solicited and requested the International Trust Company to pay the same, and the said Morris having notified the International Trust Company on or about the 1st of September, that the premium had not been paid by Gordon, and that he was about to cancel the policy, and the said International Trust Company having requested him to delay the said cancellation until he heard further from it, the said International Trust Company did on the 22nd day of September 1893, request the said Morris to send the said Gordon's bill for said premium to said International Trust Company, which the said Morris did on the following day, and thereupon the said International Trust Company on the 26th of September, 1893, paid the said premium upon the said policy in full. And the money so paid as premium remained in the possession of the agent of defendant Company, or of defendant Company, itself, up to and until the 21st day of February, 1894, but at the time of the payment of the premium neither the defendant nor its agent Morris had any knowledge of the sale of the Gordon note to the Investor's Company, nor of any sale of the property by Gordon, but believed at all times until after the fire that the International Trust Company was at all times the sole and unconditional owner of the Gordon indebtedness and note, and that Gordon was the sole and unconditional owner of the building subject

to the trust deed to Tatcher. That after the fire and after the bringing of this suit, and on; to-wit, the 21st day of February, 1894, and when the defendant had been informed of the sale and transfer of the said property and note, the defendant duly tendered back to the International Trust Company the said premium, and all costs which had accrued in said suit up to the date of tender; to-wit, the amount of $72.21; which plaintiff refused to accept; and said tender was kept good by a deposit of the said sum of $72.21 with the clerk of this Court;"
303 because there is no evidence to support the finding made by the Court, and because the evidence shows the facts to be as defendant requested the Court to find.

XXXVI.

The Court below erred in not substituting for the eighteenth special finding made by the Court the substitute requested by the defendant; viz.,

"That on the 3rd of November, 1893, proofs of loss were furnished to the defendant company by the International Trust Company; which said proofs of loss were in substantial conformity with the requirements of the policy so far as they went. That on the 6th day of December, 1893, proofs of loss executed by John R. Gordon on December 4, 1893, were furnished to the defendant not as a separate claim, but as a part and parcel of the claim and an additional proof of plaintiff company. That the plaintiff by its proof of loss offered to furnish any other information that might be required on call, and that the same should be considered a portion of the original proofs. That on the 5th of January, 1894, the defendant company, by its general agent, E. P. Piper, by letter notified the plaintiff that the said proofs of loss so furnished on November 3, 1893, were incorrect and incomplete and could not be accepted as complying with the terms and conditions of the policy of insurance, and that the defendant company, on said date informed the plaintiff that it, the defendant, could not tell from said proofs of loss whether or not it was indebted to the plaintiff for any loss under the policy, or if indebted, to what amount, and disputed the fact and claim of the plaintiff that it had suffered a loss to the extent of $125,000. And that it the defendant company, rejected the said documents, and declined to receive them as satisfactory proofs of loss under the terms of the policy, and requested the plaintiff to furnish further proofs of loss. That the plaintiff company as a compliance with said request, delivered to defendant company a
304 further statement or proof of loss, which was received by defendant on the 12th day of January, 1894, and which defendant acknowledged was a substantial compliance

with the terms and provisions of the policy so far as the furnishing of proofs of loss were concerned; i. e., plaintiff had furnished everything they called for; but neither admitted nor denied the truth of the contents thereof, or the facts set out therein or in the original proofs. That in said proof of loss so furnished by plaintiff on November 3, 1893, plaintiff stated that it held at the time of the fire a total insurance of $50,000 and that among other policies comprising the $50,000 insurance were two policies of $10,000 each in the Alliance Insurance Company;" because there is no evidence to support the finding made by the Court; and because the evidence shows the facts to be as defendant requested the Court to find.

XXXVII.

The Court below erred in not substituting for the nineteenth special finding made by the Court the substitute requested by the defendant company, because there is no evidence to support the finding made by the Court, and because the evidence shows the facts to be as defendant requested the Court to find.

XXXVIII.

The Court below erred in not substituting for the twentieth special finding made by the Court the substitute requested by the defendant company, because there is no evidence to support the finding made by the Court, and because the evidence shows the facts to be as defendant requested the Court to find.

305

XXXIX.

The Court below erred in not substituting for the twenty-first special finding made by the Court the substitute requested by the defendant Company, because there is no evidence to support the finding made by the Court, and because the evidence shows the facts to be as defendant requested the Court to find.

XL.

The Court below erred in not substituting for the twenty-second special finding made by the Court the substitute requested by the defendant; viz.,

"That there was never any arbitration or appraisal concerning the amount of loss under the provisions of the policy of insurance aforesaid, nor was there any appraisement or estimate or agreement by the defendant and the plaintiff or by the defendant and Gordon as to the amount of loss nor was an arbitration ever demanded by either party. That defendant, by its letter of January 5, 1894, questioned and disputed the amount of loss which the plaintiff by its proofs of loss claimed to have sustained;"

because there is no evidence to support the finding made by the Court, and because the evidence shows the facts to be as defendant requested the Court to find.

XLI.

The Court below erred in not substituting for the twenty-third special finding made by the Court the substitute requested by the defendant; viz.,

> "That suit was begun by the International Trust Com-
> 306 pany against the defendant Company on the 17th day of February, 1894, more than sixty days after the original proofs of loss had been furnished by the International Trust Company to the defendant Company, but within less than forty-five days after the amendment or additional proof of loss was furnished on January 12, 1894, and within thirty-three days after the amendment of the proof of loss furnished on January 16, 1894;"

because there is no evidence to support the finding made by the Court, and because the evidence shows the facts to be as defendant requested the Court to find.

XLII.

The Court below erred in not substituting for the twenty-fourth special finding; viz., "That the plaintiff Company is entitled to a judgment", the request made by the defendant that judgment be entered for the defendant; because there is no evidence to support the finding made by the Court, and because the evidence shows that as a matter of law judgment should be entered for the defendant.

XLIII.

The Court below erred in entering judgment in said cause in favor of the plaintiff below (defendant in error) and against the defendant below (plaintiff in error).

XLIV.

There is no evidence to support the finding of the Court below.

XLV.

307 There is no evidence to support the judgment.

XLVI.

The judgment is against the law.

XLVII.

The findings and judgment are not supported by the evidence.

XLVIII.

The findings and judgment are against the law.

Wherefore, plaintiff in error prays that the judgment aforesaid for the errors aforesaid may be reversed, annulled, and altogether holden for naught, and that the plaintiff in error may be restored to all things which it hath lost by reason of the judgment and proceedings aforesaid.

MILTON SMITH,
Attorney for Plaintiff in Error.

T. J. O'DONNELL, } Of Counsel.
W. S. DECKER, }

(Indorsed). No. 3,061. In the United States Circuit Court of Appeals. The Sun Insurance Office, Plaintiff in Error, vs. The International Trust Co., Defendant in Error. Assignment of Errors. Filed May 8, 1895. Robert Bailey, Clerk U. S. Circuit Court. Milton Smith, Attorney for Plaintiff in Error.

* * * * * * *

Filed June 20, 1895. John D. Jordan, Clerk.

And on the twenty-fourth day of June, A. D. 1895, an appearance of counsel for plaintiff in error was filed in the Clerk's office of said Circuit Court of Appeals in the words and figures following:

United States Circuit Court of Appeals, Eighth Circuit.

No. 663. May Term, 1895.

The Sun Insurance Office of London, England, Plaintiff in Error,

vs.

The International Trust Company of Denver, Colorado.

The Clerk will enter my appearance as Counsel for the Plaintiff in Error.

MILTON SMITH.

Of Counsel,
T. J. O'Donnell,
W. S. Decker.

Endorsed: "U. S. Circuit Court of Appeals, Eighth Circuit. May Term, 1895. No. 663. The Sun Insurance Office, etc., Plaintiff in Error, vs. The International Trust Co. Appearance. Filed Jun. 24, 1895. John D. Jordan, Clerk. Milton Smith, Denver, Col. Counsel for Plff. in Error."

And on the third day of July, A. D. 1895, appearance of counsel for defendant in error was filed in the Clerk's office of said Circuit Court of Appeals in the words and figures following:

United States Circuit Court of Appeals, Eighth Circuit.

No. 663. May Term, 1895.

The Sun Insurance Office of London, England, Plaintiff in Error,

vs.

The International Trust Company.

The Clerk will enter my appearance as Counsel for the Defendant in Error.

A. E. PATTISON.
A. C. CAMPBELL.

Endorsed: "U. S. Circuit Court of Appeals, Eighth Circuit. May Term, 1895. No. 663. The Sun Insurance Office of London, England, Plaintiff in Error, vs. The International Trust Co. Appearance. Filed Jul. 3, 1895. John D. Jordan, Clerk. A. E. Pattison, A. C. Campbell, Counsel for Defendant in Error."

And on the sixteenth day of October, A. D. 1895, in the record of the proceedings of said Circuit Court of Appeals is an order of submission in said cause in the words and figures following, to-wit:

United States Circuit Court of Appeals, Eighth Circuit.

May Term, 1895.

Wednesday, October 16, 1895.

The Sun Insurance Office of London, England, Plaintiff in Error,
No. 663. vs.
The International Trust Company of Denver, Colorado, Defendant in Error.

In Error to the Circuit Court of the United States for the District of Colorado.

This cause having been called for hearing, argument was commenced by Mr. Milton Smith, for plaintiff in error, and concluded by Mr. A. C. Campbell, for defendant in error.

Thereupon, this cause was submitted to the Court on the transcript of record from said Circuit Court and the briefs of counsel filed herein.

And on the second day of December, A. D. 1895, an opinion of said United States Circuit Court of Appeals was filed in said cause in the following words, to-wit:

UNITED STATES CIRCUIT COURT OF APPEALS

EIGHTH CIRCUIT.

No. 660.—December Term, A. D. 1895.

The Insurance Company of North America, Plaintiff in Error.
vs.
The International Trust Company, Defendant in Error.

In Error to the Circuit Court of the United States for the District of Colorado.

No. 663.—December Term, A. D. 1895.

The Sun Insurance Office, of London, England, Plaintiff in Error.
vs.
The International Trust Company, of Denver, Colorado, Defendant in Error.

In Error to the Circuit Court of the United States for the District of Colorado.

Mr. Sylvester G. Williams and Mr. M. F. Taylor (Mr. E. T. Wells and Mr. John G. Taylor were with them on brief) for the Insurance Company of North America.

Mr. Milton Smith (Mr. T. J. O'Donnell and Mr. W. S. Decker were with him on brief) for the Sun Insurance Office.

Mr. A. C. Campbell (Mr. A. E. Pattison was with him on brief) for defendant in error.

Before Caldwell, Sanborn and Thayer, Circuit Judges.

Thayer, J., delivered the opinion of the court.

These were suits brought by the International Trust Company of Denver, Colorado, the Defendant in Error, against the Insurance Company of North America and the Sun Insurance Office of London, England, the Plaintiffs in Error, to enforce the payment of two policies of insurance which were issued by the respective companies to one John R. Gordon, but with a mortgage clause thereto attached which made the loss under the policies payable to the International Trust Company of Denver, Colorado, and its assigns, which company is

hereafter referred to for convenience as the Trust Company. The suits grew out of the same loss, and involve a consideration of the same facts which were considered by this court in the case of The International Trust Company of the City of Denver vs. The Norwich Union Fire Insurance Society, *ante* page —.

The present suits, however, were actions at law on policies that had been duly executed and delivered to the Trust Company prior to the occurrence of the loss. On the trial of the cases a jury was duly waived, and the Circuit Court at the conclusion of the trial made and filed a special finding of facts which forms a part of the record in each case. It is unnecessary to set out the special findings of facts in full, as the finding on most of the issues in conceded to be correct. It is also conceded that the facts as found fully support the judgments which were rendered against the respective insurance companies. The chief contention in these cases is that when the policies in suit were issued the Trust Company had no insurable interest in the insured property. That contention is based on the same state of facts which formed the basis for a similar contention in the case of The International Trust Company vs. The Norwich Union Fire Insurance Society, namely, on the ground that the Trust Company had not reacquired the Gordon note for fifty thousand dollars and the deed of trust securing the same when the policies in suit were issued, and for that reason had no such insurable interest as would suffice to support the policies. The Circuit Court found, however, "that * * * the International Trust Company did on the twelfth day of June, 1893, reacquire title to the note of said John R. Gordon by repurchase, and did reacquire an insurable interest in and to the property covered by the policy of insurance issued by the defendant company; and the Trust Company did on the twelfth day of June, 1893, actually pay to the said Investor's Mortgage Security Company the sum of $1,750, being part of the amount due upon repurchase, and did assume the payment of the balance of the purchase price, viz., $50,000, and did from that time on treat and dispose of said note as its own property."

This finding by the trial court is conclusive in this court and cannot be reviewed. It matters not, we think, that the finding in question is based largely upon letters and telegrams which passed between the Trust Company and the Investor's Mortgage Security Company, and upon deductions drawn from such correspondence. A special finding of fact, as was said by Mr. Justice Miller in Burr vs. Des Moines Nav. & R. R. Co., 1 Wallace 99, 102, "is a statement of the ultimate facts or propositions which the evidence is intended to establish, and not the evidence on which those ultimate facts are supposed to rest. The statement must be sufficient in itself, without inferences or comparisons, or balancing of testimony, or weighing evidence, to justify the application of the legal principles which must determine the case. It must leave none of the functions of a jury to be discharged by this court, but must have all the sufficiency, fullness and perspicuity of a special verdict. If it requires of the court to weigh conflicting testimony, or to balance admitted facts, and deduce from

these the propositions of fact on which alone a legal conclusion can rest, then it is not such a statement as this court can act upon." See also Hinkley vs. City of Arkansas City, 69 Fed. Rep., 768, 771; Id., — U. S. App. —. It resulted from this view that when a trial court is called upon to state the ultimate propositions or facts established by the evidence, in the form of a special finding, it will often be compelled to embody in the finding some legal inferences as well as inferences of fact. Such will generally be the case when, as in the present instance, the ultimate fact to be found relates to the acquisition or ownership of property. We think, therefore, that the conclusive effect of a special finding of fact cannot be made to depend upon the character of the proof upon which it rests. If such a finding is regarded as conclusive and not subject to review when it rests upon oral testimony, it must be regarded as equally conclusive when it rests upon written evidence, or on evidence that is in part written and in part oral. The rule is inflexible in the Federal Courts that when a jury is waived and the court makes a special finding, an appellate court cannot look into the evidence upon which a finding is based, except for the purpose of ascertaining whether an error was committed in admitting or excluding testimony. Stanley vs. Supervisors of Albany, 121 U. S. 535, 547; Walker vs. Miller, 19 U. S. App. 403; Id., 8 C. C. A. 331; Searcy County vs. Thompson, 13 C. C. A. 349. In the present cases no objection was made to the evidence on which the finding in question was based, nor was the court asked to reject or to exclude the evidence after it had been introduced, on the ground that it had no tendency to show that the Trust Company had an insurable interest in the insured property when the policies in controversy were issued. On the contrary, the case was tried on the evident assumption that the evidence in question had some tendency to establish the existence of an insurable interest, and the objection now urged is in substance that the finding made by the trial court was against the weight of evidence. It goes without saying that we cannot notice an objection of that character. Hartford Life Annuity Ins. Co. vs. Unsell, 144 U. S. 439, 451.

But even if the special finding now under consideration was open to review by this court, we should not be able to say that the Circuit Court erred in finding that the Trust Company had such an insurable interest as was sufficient to support the policies. In the case of the International Trust Company vs. the Norwich Union Fire Insurance Society, we have held that the Trust Company had an insurable interest on June 26, 1893, by virtue of the consummated agreement with the Investors' Mortgage Security Company to take up the Gordon note, which was secured by a deed of trust on the insured property. It was further shown in these cases that on June 12, 1893, the Trust Company had advanced and paid the interest on said note, amounting to $1,750, and we think it most probable, in view of the relations then existing between the Trust Company and the Mortgage Company, that the payment so made gave to the former company such an interest in the note and deed of trust as would serve to support a policy covering the mortgaged property which was taken out after that date.

There are no other questions arising upon the record in these cases which can be considered in view of the special finding of facts and in view of the recent decision of this court in the case of the Syndicate Insurance Company vs. Bohn, 12 C. C. A. 531; — U. S. App. —.

In that case this Court held that a mortgage clause such as was attached to each of the policies in suit had the effect of creating a new contract between the mortgagee and the Insurance Company, which was dependent for its validity solely upon the conduct of the company and the mortgagee, and was unaffected by any act or neglect of the mortgagor of which the mortgagee was ignorant, whether such act was done or omitted prior or subsequent to the execution of the mortgage clause. To that ruling we still adhere, and it results from that view of the effect of the mortgage clause that the policies in suit were not rendered invalid by the sale and conveyance of the mortgaged property by Gordon, the mortgagee, on or about July 3, 1893. In the policy issued by the Sun Insurance Office, of London, England, there appear to have been two mortgage clauses attached to the policy. The first of these clauses was as follows: "Loss, if any, payable to M. D. Thatcher, trustee for the International Trust Company of Denver, Colorado, as his interest may appear," whereas by the second mortgage clause the loss was made payable directly to the International Trust Company. The second clause is a more full and complete contract between the mortgagee and the Insurance Company, being in substance the same mortgage clause that was construed by this court in Syndicate Insurance Company vs. Bohn, supra.

The point is made that the first of these mortgage clauses controls the second, and that as the first clause does not exempt the Trust Company from liability for the acts of the mortgagor, the policy of the Sun Insurance Office was avoided by the sale made by the mortgagor on July 3, 1893. We cannot assent to this view. The second mortgage clause being more full and complete, and the last apparently to be attached to the policy, should be taken, we think, as containing the latest expression of the intentions of the contracting parties. We are of opinion, therefore, that the last clause supersedes and controls the former so far as they are in conflict. The result is that the judgment of the Circuit Court in each of the cases now under consideration must be affirmed.

Sanborn, J., concurring.

I am unable to concur in the view taken by the majority of the court, that the question whether or not there was any evidence sufficient to support a finding that the International Trust Company of Denver, the defendant in error, had an insurable interest in the property destroyed, was not presented for our consideration by the record in these cases. At the close of the evidence counsel for plaintiff in error moved the court for a finding and judgment in its favor, "upon the ground that the evidence is insufficient to show a cause of action in favor of the plaintiff company, or to support a finding for the plaintiff company, or to support a judgment entered upon such finding for the plaintiff company," and this motion was denied and an exception to this ruling of the court was taken. In my view, this motion had the same effect that a request to the court to instruct the jury peremptorily to find for the defendant would have had if the trial had been before a jury. It is not necessary to pass upon the weight or the sufficiency of the evidence to determine this question of law. It is to be decided like a question which arises upon such a request to the jury—upon the concession that the motion must be denied if there is evidence in the record sufficient to sustain a finding for the plaintiff. Rev. Stat., sec. 700; Clement vs. Insurance Co., 7 Blatch. 51, 53, 54, 58; Lehnen vs. Dickson, 148 U. S. 71, 72, 78; Martinton vs. Fairbanks, 112 U. S. 670, 672, 674; St. Louis vs. Western Union Tel. Co., 148 U. S. 92, 96; Mercantile Trust Co. vs. Wood, 8 C. C. A. 658; 60 Fed. Rep. 346, 348; Searcy County vs. Thompson, 13 C. C. A. 349, 354 to 358; 66 Fed. Rep. 92.

As all the evidence relating to the insurable interest of the defendant in error consisted of letters contained in the record, this motion in my view raised the question whether or not all reasonable men upon the perusal of those letters would, in the exercise of a sound and unprejudiced judgment, come to the conclusion that these letters did not show that the defendant in error had an insurable interest in the property destroyed. The opinion of the trial judge and the opinion of the judges of this court upon this question in The International Trust Company of the City of Denver vs. The Norwich Union Fire Insurance Company, ante, page —, and in these cases, foreclose the consideration of this question, and on that ground I concur in the result here.

Filed December 2, 1895.

[Transcript page 196.]

And on the second day of December, A. D. 1895, in the record of the proceedings of said Circuit Court of Appeals is a judgment in the said cause in the words and figures following:

United States Circuit Court of Appeals, Eighth Circuit.

December Term, 1895.

Monday, December 2, 1895.

The Sun Insurance Office of London, England, Plaintiff in Error,
No. 663. vs.
The International Trust Company of Denver, Colorado, Defendant in Error.

In Error to the Circuit Court of the United States for the District of Colorado.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the District of Colorado, and was argued by counsel. On consideration whereof it is now here ordered and adjudged by this Court that the judgment of the said Circuit Court in this cause be, and the same is hereby affirmed with costs; and that The International Trust Company of Denver, Colorado, have and recover against The Sun Insurance Office of London, England, the sum of twenty dollars for its costs herein, and have execution therefor.

And on the twenty-fourth day of January, A. D. 1896, a petition for re-hearing was filed in the Clerk's office of said Circuit Court of Appeals in the words and figures following, to-wit:

UNITED STATES CIRCUIT COURT OF APPEALS

EIGHTH CIRCUIT.

No. 663.—December Term, A. D. 1895.

The Sun Insurance Office, of London, England,
Plaintiff in Error,

vs.

The International Trust Company, of Denver, Colorado,
Defendant in Error.

In Error to the Circuit Court of the United States for the District of Colorado.

Petition for Re-Hearing.

To the Honorable, the Judges of the United States Circuit Court of Appeals for the Eighth Circuit.

Now comes the plaintiff in error, the Sun Insurance Office, and petitions this Court to set aside the judgment in this cause heretofore rendered by this Court, and to grant a re-hearing thereof, and as grounds therefor says:

I.

The Court erred in holding that the alleged findings of fact by the trial Court are conclusive upon this Court, and that the said findings cannot be reviewed, and that the evidence will not be examined by this Court in order to determine whether there is any evidence to support the findings of the trial Court.

II.

The court erred in holding that the evidence will not be examined to ascertain whether there is any evidence to support the findings of the trial Court, or whether the findings of the trial Court are correct, notwithstanding the fact that plaintiff in error requested declarations of law raising the question of whether the findings of the trial Court were supported by any evidence.

III.

The court erred in holding that the finding of the trial Court "that the International Trust Company did on the 12th day of June, 1893, reacquire title to the Gordon note and an insurable interest in the property, and that the Trust Company did on the 12th of June, 1893, actually pay to the Investors' Company the sum of $1,750 as part of the amount due upon repurchase, and did assume the balance of the purchase price, and did from that time on treat and dispose of said note as its own property," is conclusive upon this Court, and that the said finding will not be reviewed, nor the evidence alleged to support it be reviewed.

[Transcript page 199.]

IV.

The Court erred in refusing to review the evidence as to whether on the 14th day of June, 1893, the date of the policy in question, the International Trust Company had an insurable interest and the insurable interest required by the terms of the policy, notwithstanding the request by plaintiff in error for a declaration of law that, upon all the evidence, the Trust Company had no such interest on said date.

V.

The court erred in assuming and holding that the finding of the trial Court as to the repurchase of the Gordon note and the possessing of an insurable interest by the International Trust Company, was a finding of fact, whereas it was a finding of law and not a finding of fact.

VI.

The Court erred in refusing to construe the correspondence between the International Trust Company and the Investors' Mortgage Security Company, relating to the re-purchase of the Gordon note as a question of law, and in treating the finding by the trial Court in this regard as precluding a review thereof by this Court.

VII.

The Court erred in assuming, as stated in the opinion, that the special findings of facts on most of the issues are conceded to be correct, whereas the Sun Insurance Office alleges that the findings as to the repurchase of the Gordon note, the acquirement of an insurable interest in the property insured on the twelfth of June, 1893, and the furnishing of proofs of

loss within less than sixty days prior to the bringing of suit, are all incorrect.

VIII.

The Court erred in assuming that "It is conceded that the facts as found fully support the judgment rendered," whereas it is not so conceded, but it is contended that the facts as found by the trial Court do not support the judgment, because the findings show that Gordon sold and disposed of his interest in the property on the third of July, 1893, and there is nothing in the policy exempting the International Trust Company from the acts of Gordon.

IX.

The Court erred in assuming that the chief contention in this case is, that when the policy in the suit was issued, the Trust Company had no insurable interest in the property; whereas, while that contention is made, the Sun Insurance Office further claims that, if the Trust Company did have any interest, it did not have the insurable interest required by the conditions of the policy and mortgage clause.

X.

The Court erred in assuming and holding that the finding of the trial Court that the Trust Company reacquired "an insurable interest" in the property was, in effect, the same as a finding that it reacquired the insurable interest required by the conditions of the policy.

XI.

The Court erred in holding that the trial Court did not err in finding that the Trust Company had at the time the policy

was issued, such an insurable interest as was sufficient to support the policy.

XII.

The Court erred in but partially considering the evidence as to whether the findings of the trial Court were supported by any evidence, it being the duty of the Court to fully do so, upon the questions of whether the Trust Company had repurchased the Gordon note, and had an insurable interest, and had the insurable interest required by the policy, and as to whether the suit was prematurely brought.

XIII.

The Court erred in holding that it was concluded by the findings of this Court in the case of the International Trust Company vs. the Norwich Union Fire Insurance Society, as to the facts found respecting the insurable interest of the International Trust Company on the date of the issuance of the policy of the Sun Insurance Office, it appearing from the opinion that the Norwich Union policy was claimed to have been issued after the first of July, whereas, the policy in this suit was issued on the fourteenth of June, 1893, being but two days after the International Trust Company first addressed the Investor's Mortgage Security Company as to the repurchase of this Gordon note, within which time an acceptance of the offer, if one was made by the Trust Company, to repurchase the note, from the nature of things, could not have been received by the Investor's Mortgage Security Company in Scotland.

XIV.

The Court erred in holding that the payment on the twelfth day of June, 1893, by the Trust Company, of the interest on

the Gordon note, amounting to $1,750, was a payment upon the purchase price of said note, it being shown by the record, and particularly the correspondence, that the payment of this amount was but an advancement for and on behalf of John R. Gordon, which advancement was actually repaid by Gordon to the Trust Company on the nineteenth of June, 1893, by which payment any interest which the Trust Company might have acquired by it was divested and terminated, so that if on the fourteenth day of June, 1893, by reason of the payment of the said amount, the Trust Company had an insurable interest, that insurable interest was divested by the repayment by Gordon to the Trust Company of the advancement, and unless the so-called offer to repurchase the Gordon note, claimed to have been made on the twelfth of June, 1893, had been accepted, the Trust Company had no insurable interest whatever, and the record shows that on the nineteenth day of June, 1893, the Trust Company had received no answer from the Investor's Mortgage Security Company in regard to its alleged offer to repurchase the Gordon note, and thereupon the insurance, if any it had, terminated, nor did the insurance revive by reason of the subsequent purchase by the Trust Company of the said note, because an acceptance of an offer dates from the day of acceptance, and does not relate back to the date of the offer, and where the acceptance is made by letter or cable, it dates from the time of depositing the letter in the postoffice or telegraph office.

XV.

The Court erred in holding that the payment on June 12, 1893, by the Trust Company of the interest on the Gordon note, amounting to $1,750, was a payment upon the purchase price of said note, and that by reason of said payment the

Trust Company reacquired the insurable interest at the date of the policy called for by the policy.

XVI.

The Court erred in not construing the mortgage clause with respect to the resulting rights of the parties named in the policy and mortgage clause, as asked for by the Sun Insurance Office, and in not holding in that regard that, under the policy and mortgage clause and findings of fact, the judgment should have been for the plaintiff in error.

XVII.

The Court erred in affirming the judgment of the trial Court upon the special findings of fact.

XVIII.

The Court erred in refusing to consider whether or not there was evidence to support the special findings of fact.

XIX.

The Court erred in assuming that the findings on most of the issues are conceded to be correct.

XX.

The Court erred in holding that when a jury is waived and the trial Court makes a special finding, this Court cannot look into the evidence on which the finding is based, notwithstanding a request for declarations of law testing the correctness of such special finding.

XXI.

The Court erred in holding in effect that plaintiff in error could not rely upon having the evidence looked into in this case

[Transcript page 204.]

testing the special findings, where declarations of law had been requested, in view of the reported decisions of this Court in other cases governing such procedure.

XXII.

The court erred in holding that there was no objection made to the evidence on which the finding relative to insurable interest was based, because the record shows that the plaintiff in error objected to the introduction of any evidence on that question.

XXIII.

The Court erred in holding that the mortgage clause attached to the policy, set out in the opinion and denominated "the first clause," was controlled by that clause denominated "the second clause."

XXIV.

The Court erred in assuming that the so-called second clause was last attached to the policy, the record showing that they were attached simultaneously.

XXV.

The Court erred in holding that the motion of the plaintiff in error at the close of the testimony for a judgment in its favor, "upon the ground that the evidence is insufficient to show a cause of action in favor of the plaintiff company, or to support a finding for the plaintiff company, or to support a judgment entered upon such finding for the plaintiff company," did not present for the consideration of this Court the question of whether or not there was any evidence to support the finding that the International Trust Company did have an insurable interest in the property destroyed, because it presents a question of law, and law questions are always reviewable.

[Transcript page 205.]

MILTON SMITH,
Attorney for Plaintiff in Error.

T. J. O'DONNELL,
W. S. DECKER,
Of Counsel.

I, Milton Smith, attorney for plaintiff in error in the above entitled cause, do hereby certify that the above and foregoing petition for a re-hearing thereof is made in good faith and in the honest belief that the said petition should be granted; and I further certify that to the best of my opinion the grounds for said application, as therein stated, are sufficient in law, and that said petition is not made for the purpose of vexation or delay.

MILTON SMITH,
Attorney for Plaintiff in Error.

Denver, Colo., January 15, 1895.

Endorsed: Filed January 24, 1896.

JOHN D. JORDAN, Clerk.

[Transcript page 206.]

And on the third day of February, A. D. 1896, in the record of the proceedings of said Circuit Court of Appeals is an order denying the petition for a re-hearing, in the words and figures following, to-wit:

United States Circuit Court of Appeals, Eighth Circuit.

December Term, 1895.

Monday, February 3, 1896.

The Sun Insurance Office of London, England, Plaintiff in Error,
No. 663. vs.
The International Trust Company of Denver, Colorado, Defendant in Error.

In Error to the Circuit Court of the United States for the District of Colorado.

This cause came on this day to be heard upon the petition for a re-hearing and the brief filed in support thereof by counsel for plaintiff in error.

On consideration whereof, it is now here ordered and adjudged by this Court that said petition for a re-hearing be, and the same is hereby denied.

February 3, 1896.

[Transcript page 207.]

United States Circuit Court of Appeals, Eighth Circuit.

I, John D. Jordan, Clerk of the United States Circuit Court of Appeals, Eighth Circuit, do hereby certify that the foregoing 206 pages contain a full, true and complete copy of the transcript of record, as printed by stipulation of the parties for the use of the Court on the hearing, and full, true and complete copies of all the pleadings, proceedings and record entries, including the opinion of said Circuit Court of Appeals in the case of The Sun Insurance Office of London, England, Plaintiff in Error, vs. The International Trust Company of Denver, Colorado, Defendant in Error, No. 663, December Term, 1895, as the same remain upon the files and records of said United States Circuit Court of Appeals.

In Testimony Whereof, I hereunto subscribe my name and affix the seal of said United States Circuit Court of Appeals at the City of St. Louis, Missouri, this fifteenth day of February, A. D. 1896.

JOHN D. JORDAN,
[SEAL] Clerk U. S. Circuit Court of Appeals,
Eighth Circuit.

163 U S 707

Office Supreme Court U.S.
FILED
MAR 9 1896
JAMES H. McKENNEY,
CLERK.

163-707

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1895.

923.

THE SUN INSURANCE OFFICE OF LONDON, ENGLAND,
PLAINTIFF IN ERROR,
vs.
THE INTERNATIONAL TRUST COMPANY OF DENVER,
COLORADO, DEFENDANT IN ERROR.

THE SUN INSURANCE OFFICE OF LONDON, ENGLAND,
PETITIONER.

PETITION FOR WRIT OF CERTIORARI REQUIRING THE CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT TO CERTIFY TO THE SUPREME COURT FOR ITS REVIEW AND DETERMINATION THE CASE OF THE SUN INSURANCE OFFICE OF LONDON, ENGLAND, PLAINTIFF IN ERROR, VS. THE INTERNATIONAL TRUST COMPANY OF DENVER, COLORADO, DEFENDANT IN ERROR.

MILTON SMITH,
T. J. O'DONNELL,
W. S. DECKER,
Attorneys for the Sun Insurance Office, of London, England.

In Testimony Whereof, I hereunto subscribe my name and affix the seal of said United States Circuit Court of Appeals at the City of St. Louis, Missouri, this fifteenth day of February, A. D. 1896.

JOHN D. JORDAN,
[SEAL] Clerk U. S. Circuit Court of Appeals,
Eighth Circuit.

163 U S 707

Office Supreme Court U. S.
FILED
MAR 9 1896
JAMES H. McKENNEY,
Clerk.

163-707

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1895.

923

THE SUN INSURANCE OFFICE OF LONDON, ENGLAND,
PLAINTIFF IN ERROR,

VS.

THE INTERNATIONAL TRUST COMPANY OF DENVER,
COLORADO, DEFENDANT IN ERROR.

THE SUN INSURANCE OFFICE OF LONDON, ENGLAND,
PETITIONER.

PETITION FOR WRIT OF CERTIORARI REQUIRING THE CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT TO CERTIFY TO THE SUPREME COURT FOR ITS REVIEW AND DETERMINATION THE CASE OF THE SUN INSURANCE OFFICE OF LONDON, ENGLAND, PLAINTIFF IN ERROR, VS. THE INTERNATIONAL TRUST COMPANY OF DENVER, COLORADO, DEFENDANT IN ERROR.

MILTON SMITH.
T. J. O'DONNELL.
W. S. DECKER.
Attorneys for the Sun Insurance Office, of London, England.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1895.

THE SUN INSURANCE OFFICE OF LONDON, ENGLAND, PLAINTIFF IN ERROR,

vs.

THE INTERNATIONAL TRUST COMPANY OF DENVER, COLORADO, DEFENDANT IN ERROR.

THE SUN INSURANCE OFFICE OF LONDON, ENGLAND, PETITIONER.

PETITION FOR WRIT OF CERTIORARI REQUIRING THE CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT TO CERTIFY TO THE SUPREME COURT FOR ITS REVIEW AND DETERMINATION THE CASE OF THE SUN INSURANCE OFFICE OF LONDON, ENGLAND, PLAINTIFF IN ERROR, VS. THE INTERNATIONAL TRUST COMPANY OF DENVER, COLORADO, DEFENDANT IN ERROR.

To the Honorable, the Supreme Court of the United States:

The petition of the Sun Insurance Office of London, England, respectfully shows to this Honorable Court as follows:

I.

That your petitioner is a corporation organized under the laws of England, and is and was at the times herein mentioned engaged in the business of fire insurance in the United States and in the State of Colorado, by virtue of a compliance with the laws of the State of Colorado, having its principal place of business in the United States at the City of New York, but with agencies located elsewhere throughout the United States, and among them a local agency at Pueblo, in the State of Colorado.

That the International Trust Company is a corporation organized under the laws of the State of Colorado, with its principal place of business at the City of Denver, in said state.

II.

That the International Trust Company filed its complaint against your petitioner in the Circuit Court of the United States for the District of Colorado, at the November Term, A. D. 1894, of said Court, seeking to enforce payment of a policy of insurance issued by your petitioner to one John R. Gordon, in the sum of $5,000, upon the Mesa Hotel building, situated in the City of Pueblo, Colorado, which building had prior thereto, and on, to-wit, the 9th day of October, A. D. 1893, been destroyed by fire.

The cause was tried before the Honorable John A. Riner, District Judge, without a jury, and upon the issues joined and the trial of said cause, a judgment was entered for the plaintiff for $5,000 and costs of suit. From said judgment your petitioner sued out a writ of error from the Circuit Court of Appeals for the Eighth Circuit; which Court, at its December Term, A. D. 1895, affirmed the judgment of the Circuit Court. On the 15th day of January, A. D. 1896, a petition for rehearing was filed within the time required by law in said Circuit Court of Appeals; which said petition was denied. From the judgment of the Circuit Court of Appeals affirming the judgment of the Circuit Court your petitioner seeks relief and sues for this writ.

III.

A certified copy of the entire record of said cause in the Circuit Court of Appeals is herewith furnished and hereto annexed as part of this application, in conformity with rule 37 of this Honorable Court, relating to cases from the Circuit Court of Appeals, and is marked Exhibit "A."

IV.

The International Trust Company, Plaintiff, in the Circuit Court for its cause of action alleged, *inter alia*, that your petitioner issued a policy of insurance, No. 4475789, in the amount of $5,000, running for six months from the 14th day of June, A. D. 1893, upon the Mesa Hotel building, located upon the property described in the complaint, and that your petitioner, defendant in the Circuit Court, attached to the policy a mortgage clause or agreement for the benefit and protection of the plaintiff company and its assigns, making the loss, if any, under the said policy of insurance payable to plaintiff company and its assigns; which policy of insurance and mortgage clause attached were delivered to and accepted by the plaintiff company, subject to the terms and conditions thereof, for the protection of itself and its assigns.

That John R. Gordon, not having paid the premium upon the policy, the plaintiff company, on the 26th of September, 1893, paid the premium thereon to the defendant company; that on the 9th day of October, A. D. 1893, the property was destroyed by fire. That on the date said policy was issued John R. Gordon was indebted to the plaintiff company in the sum of $50,000, which sum of money he had borrowed on December 12, A. D. 1892, and in evidence thereof had executed his promissory note of even date therewith, for a like sum, payable June 12, 1893, to the plaintiff company or its order; that to secure said note, Gordon did, on the 12th day of December, 1892, execute and deliver a deed of trust to Mahlon D. Thatcher, upon all of the certain lots described, together with all buildings and improvements thereon; that neither the note nor any portion thereof was paid at the time the buildings were destroyed; that on the date said policy was issued, and at all times between said date and the 9th day of October, 1893, the plaintiff had possessed a good and insurable interest in the property aforesaid, under and by virtue of the indebtedness of the said John R. Gordon, and said trust deed securing the same, to the amount of $50,000, with interest thereon; that both before and since the fire, the plaintiff company had done all things and performed all acts required of it by the defendant company under its agreement of insurance, or by the mortgage clause or agreement thereto attached;

that John R. Gordon also furnished notice and proofs of loss as required by the policy of insurance.

V.

For answer to the said complaint, your petitioner set out several affirmative defenses, and, among other things, denied that on the 14th day of June, 1893, the note for $50,000 was due from John R. Gordon to the plaintiff company; and denied that on said date the plaintiff company had a good and insurable interest in the property afterwards destroyed by fire; and denied that the plaintiff company had done all things required by it to be performed in regard to the ascertainment of the amount of loss and the furnishing of proofs of loss within the time provided by said policy; and denied that the defendant company had appropriated the premium to its own use and benefit, and had ever since retained and held the same; and, on the contrary, alleged that it had duly tendered to the plaintiff company the full amount thereof as soon as it was informed that the plaintiff company did not on the 14th day of June, 1893, own and possess the Gordon note, and did not have an insurable interest in the property covered by the policy; that the full amount of said tender was $72.21, and included not only the premium, but all costs which had accrued in said action up to the time of tender; that the plaintiff company refused to accept said tender; whereupon the defendant company deposited the identical money tendered, which was legal tender of the United States, with the Clerk of the United States Circuit Court for the purpose of keeping said tender good; and that the premium paid by the plaintiff company had been accepted in the first instance in ignorance of the fact that the plaintiff company had no insurable interest in and to the said property.

VI.

For one affirmative defense your petitioner set out the following condition of the policy, viz.:

"This entire policy, unless otherwise provided by agreement endorsed hereon or added hereto, shall be void * * * if any change other than by the death of the insured take place in the interest, title or possession of the subject of insurance, except change of occupancy without increase of hazard, whether by legal process or judgment or by voluntary act of the insured, or otherwise."

And alleged that a change took place after the writing, issuance, delivery and acceptance of the said policy in the title, interest and possession of the subject of insurance, in that John R. Gordon, on or about the 3rd day of July, 1893, sold, transferred, and conveyed all of his right, title and interest in and to the said hotel building, and the property upon which the same was in the course of construction, to the Mesa Hotel & Improvement Company by warranty deed; that by reason of said change of possession the said policy became absolutely void.

And alleged that the said policy further provided:

"If with the consent of this company an interest under the policy shall exist in favor of a mortgagee or of any person or corporation having an interest in the subject of insurance other than the interest of the insured, as described herein, the conditions hereinbefore contained shall apply in the manner expressed in such provisions and conditions of insurance relating to such interest as shall be written upon, or attached or appended hereto."

And alleged that attached to said policy was a mortgage clause, being the same mortgage clause mentioned in the complaint; that said mortgage clause contained no provision or provisions exempting the International Trust Company from the acts of Gordon, and that it was not exempted from Gordon's acts; and that by reason of the sale and conveyance of the said property by Gordon on the 3rd day of July, 1893, the policy and mortgage clause were avoided.

VII.

For another affirmative defense your petitioner set out the following conditions of the policy, viz.:

"This company shall not be liable beyond the actual cash value of the property at the time any loss or damage occurs, and the loss or damage shall be ascertained or estimated according to such cash value; * * * said ascertainment or estimate shall be made by the insured and this company, or if they differ, then by appraisers, as hereinafter provided; and the amount of loss or damage having been thus determined, the sum for which this company is liable pursuant to this policy shall be payable sixty days after due notice, ascertainment, estimate, and satisfactory proof of the loss have been received by this company in accordance with the terms of this policy;"

"If fire occur the insured shall give immediate notice of any loss thereby in writing to this company, protect the property from further damage, forthwith separate the damaged and undamaged personal property, put it in the best possible order, make a complete inventory of the same, stating the quantity, and cost of each article, and the amount claimed thereon; and within sixty days after the fire, unless such time is extended in writing by this company, shall render a statement to this company, signed and sworn to by said insured, stating the knowledge and belief of the insured as to the time and origin of the fire; the interest of the insured and of all others in the property; the cash value of each item thereof and the amount of loss thereon; all incumbrances thereon; all other insurance, whether valid or not, covering any of said property; and a copy of all the descriptions and schedules in all policies; any changes in the title, use, occupation, location, possession or exposures of said property since the issuing of this policy; by whom and for what purpose any building herein described and the several parts thereof were occupied at the time of the fire;"

"In the event of disagreement as to the amount of loss, the same shall, as above provided, be ascertained by two competent and disinterested appraisers, the insured and this company each selecting one, and the two so chosen shall first select a competent and disinterested umpire; the appraisers together shall then estimate and appraise the loss, stating separately sound value and damage, and failing to agree, shall submit their differences to the umpire, and the award in writing of any two shall determine the amount of such loss; the parties thereto shall pay the appraiser respectively selected by them, and shall bear equally the expenses of the appraisal and umpire;"

"This company shall not be held to have waived any provision or condition of this policy or any forfeiture thereof by any requirement, act or proceeding on its part relating to the appraisal or to any examination herein provided for, and the loss shall not become payable until sixty days after the notice, ascertainment, estimate and satisfactory proof of the loss herein required have been received by this company, including an award by appraisers when appraisal has been required;"

"No suit or action on this policy for the recovery of any claim shall be sustainable in any court of law or equity until after full compliance by the insured with all the foregoing requirements, nor unless commenced within twelve months next after the fire;"

"If, with the consent of this company, an interest under this policy shall exist in favor of a mortgagee or of any person or corporation having an interest in the subject of insurance, other than the interests of the insured, as described herein, the conditions hereinbefore contained shall apply in the manner expressed in such provisions and conditions of insurance relating to such interest as shall be written upon, attached or appended hereto."

And alleged that there was attached to the policy a mortgage clause whereby loss, if any, under the policy was made payable to the International Trust Company; that said mortgage clause contains no provision or provisions varying the terms and conditions of the policy as to the mode or method of ascertaining the amount of loss in case of fire, or the manner of choosing appraisers, where appraisers are required, or of the furnishing of proofs of loss; that plaintiff and defendant disagreed as to the amount of loss or damage occasioned by the fire, and that the defendant company notified the plaintiff company that the estimate of the amount of loss which the plaintiff company had made was neither satisfactory nor correct, and that the defendant company insisted upon a compliance with the terms of the policy in relation to the ascertainment and estimate of the amount of loss.

That there had been no appointment of appraisers to determine the amount of loss; that plaintiff company had neither offered to appoint appraisers or to submit to appraisement, nor requested the defendant company to appoint an appraiser, and that there had been no ascertainment of the amount of loss.

That on the 3rd day of November, 1893, the plaintiff company made a pretended statement and proof of loss which was materially defective and erroneous. That by said proof of loss plaintiff company stated that, "Any other information that may be required will be furnished on call and considered a portion of these proofs." That on the 5th of January, 1894, the defendant company notified the plaintiff that the proofs were unsatisfactory, and called for specific information and, a more complete proof of loss. That on the 12th day of January, 1894, plaintiff company furnished an additional statement, or proof of loss in compliance with the defendant's request of the 5th of January, 1894. That the plaintiff company still found its original proof of loss and the additional statement or proof of loss furnished on the 12th of November, 1893, defective, and on the 16th day of January, 1894, revoked and recalled its original proofs of loss, and corrected and amended the same by furnishing an additional and amended statement thereof; and that before sixty days had expired from the time of furnishing the said additional and amended statements, or either of them, the plaintiff company brought suit upon the policy; and that plaintiff company neither before nor after the bringing of suit, nor at any time furnished satisfactory proofs of loss as provided by the policy.

VIII.

For another affirmative defense your petitioner alleged that long prior to the 14th day of June, 1893, the plaintiff corporation sold, transferred and assigned to the Investors' Mortgage Security Company, Limited, of Scotland, all of its right, title and interest in and to the said note, securities and indebtedness of and from the said John R. Gordon; and that on the 14th day of June, 1893, at the time of the issuance of said policy upon which suit is brought, the plaintiff corporation was not the owner or holder of such note, securities or indebtedness, but the same were held and owned by the said Investors' Mortgage Security Company; and that plaintiff had no title or interest therein, and had ceased wholly to be either the owner or holder thereof.

IX.

For a reply to these defenses set out herein in paragraphs six, seven and eight, plaintiff alleged that if a transfer was made by Gordon of the property to the Mesa Hotel and Improvement Company, it was done without the knowledge or consent of the plaintiff, and that neither the plaintiff nor Mahlon D. Thatcher, the trustee, had any knowledge or notice of such transfer until after the fire; and denied that the plaintiff was not the owner of the Gordon note at the date of the issuance of the policy, and at all other times between said date and the destruction of said property; and alleged that plaintiff had, prior to the 14th day of June, 1893, repurchased the said note and continued the sole owner thereof ever since said time; and denied that the plaintiff and defendant differed and disagreed as to the amount of loss or damage occasioned by the fire, and that the defendant company notified the plaintiff that the estimate of the amount of loss was neither satisfactory or correct; and denied that the defendant company claimed it would insist upon a compliance with the terms and conditions of the policy in relation to the ascertainment and estimate of the loss; and alleged that the defendant company made no demand for an appraisement upon the plaintiff; admitted that there had been no appointment of appraisers to determine the amount of the loss; denied that the proof of loss furnished on the 3rd of November, 1893, was materially defective and erroneous; and denied that it revoked or withdrew any proofs of loss furnished to the defendant company.

X.

For another and separate affirmative defense the defendant alleged that the policy of insurance in this case was made a portion of the complaint; that there was attached to said policy of insurance in addition to the mortgage clause set out in the complaint, another mortgage clause in words and figures as follows, to-wit:

"Loss, if any, payable to M. D. Thatcher, trustee for the International Trust Company, of Denver, Colorado, as his interest may appear. (Their regular subrogation clause attached to the policy.)"

That said clause was written upon a separate piece of paper and attached to the policy. That by said clause M. D. Thatcher is made payee in case of loss by fire, under the policy. That the mortgage clause set out in the complaint was attached in subordination to this mortgage clause herein set out, *in haec verba*. That by reason of the sale of said property by said Gordon, the policy had been absolutely void, and that Thatcher, as payee, was entitled to recover only that which Gordon was entitled to recover. That Thatcher failed and neglected to give notice of the fire or to furnish a statement or proof of loss, or to bring suit.

To these allegations the plaintiff replied that Thatcher was a mere naked trustee only, and had no interest either in the debt due from Gordon, or the real estate; and that the attaching of said clause to the policy was an error and oversight on the part of the agent issuing the policy.

XI.

The trial Court made certain special findings of fact, and among others the following, being Nos. 13 and 14 of the special findings of said Court:

"That on or about the 3rd day of July, 1893, the said John R. Gordon transferred the title to the real estate and Mesa Hotel property aforesaid to a corporation known as the Mesa Hotel and Improvement Company, the deed of conveyance being recorded on the 3rd day of July, 1893."

"That neither the International Trust Company nor any officer thereof, nor the said M. D. Thatcher, trustee, had any notice or knowledge of such conveyance whatsoever until subsequent to the destruction of the said hotel building by fire on the 9th of October, 1893, as hereinafter set out; nor did the defendant have any such notice or knowledge of the conveyance aforesaid."

XII.

Special findings Nos. 18, 19, 20, 21, 22 and 23, made by the trial Court, are as follows:

"That on the 3rd day of November, 1893, proofs of loss were furnished to the defendant company by the International Trust Company, which said proofs of loss were in accordance and complied with the reqirements of the provisions of the policy of insurance aforesaid."

"That on or about the 16th day of January, 1894, the International Trust Company did voluntarily and without any demand on the part of the defendant company, serve upon the defendant company a notice to the effect that by mistake it had included in the proofs of loss aforesaid a policy of insurance issued by the Alliance Assurance Company of London, for $10,000, under which the International Trust Company had no legal claim, and having discovered such mistake, desired to correct the same."

"That the facts with regard to the policy of the Alliance Company, concerning which said mistake was made, were fully known to the state agent of said defendant company soon after the destruction of said hotel by fire, and no objection was ever at any time made by defendant company on account of the mention of said Alliance policy in the proofs of loss, and no point was ever made concerning the mistake aforesaid until after suit was brought against defendant company. Furthermore, that the mistake aforesaid was made in good faith and inadvertently and was immaterial, and did not in any wise affect the validity of the original proofs as filed, and did not in anywise prejudice defendant company in its determination as to the payment or refusal of payment of said policy."

"That defendant company by all of its actions and conduct from the time of said fire or shortly after, denied its liability under said policy upon grounds foreign to the matter of proofs of loss, and arising out of transactions occurring before the fire. And the defendant company did, by and through its agents, prior to the bringing of suit in this action, deny its liability under said policy upon grounds and matters arising prior to the destruction of the said hotel property; that the defense of defendant company in this suit, as shown by the evidence, principally rests upon grounds entirely foreign to the proofs of loss, and going to the question of its liability under said policy at the time of said fire. And, furthermore, that defendant company did make a tender of the premium paid by the International Trust Company, as hereinbefore set out, and claimed the right to cancel said policy."

"That there never was any appraisal concerning the amount of loss, under the provisions of the policy of insurance aforesaid, nor was any appraisal ever demanded by either party."

"That suit was begun by the International Trust Company against defendant company on the 16th day of February, 1894, more than sixty days after the proofs of loss had been furnished by the International Trust Company to defendant company."

XIII.

The Court also made, among other findings, the following, which is the seventh special finding of the trial Court:

"The International Trust Company did, on the 12th day of June, 1893, reacquire title to the said note of John R. Gordon by repurchase, and did reacquire an insurable interest in and to the property covered by the policy of insurance issued by the defendant company; that the said Trust Company did, on the 12th day of June, 1893, actually pay to the said Investors' Mortgage Security Company the sum of $1,750, being part of the amount due upon repurchase, and did issue the balance of the purchase price, viz., $50,000, and did, from that time on, treat and dispose of said note as its own property. That although said note has never been foreclosed, no definite extension of the same has ever been given, and the same has remained in default ever since the 12th day of June, 1893."

Also the following special finding, being the eighth special finding of the trial Court:

"That by agreement between the International Trust Company and the said Investors' Mortgage Security Company, the International Trust Company was given time wherein to make the payment of the balance of $50,000 upon the repurchase price as aforesaid, and it did thereafter pay said amount in full to the Investors' Mortgage Security Company with interest thereon at the rate of 7 per cent from June 12, 1893, to September 12, 1893, and at the rate of 9 per cent from September 12th to the date of payment."

XIV.

With regard to the matter of the repurchase of the Gordon note by the International Trust Company from the Investors' Mortgage Security Company, the record and findings of fact show that on or about the 29th day of December, 1892, the International Trust Company sold and transferred, *without recourse*, to the Investors' Mortgage Security Company, Limited, of Scotland, the said note of John R. Gordon; and that no notice was ever given to the defendant company of said sale and transfer of said note.

At the maturity of the note, June 12, 1893, Gordon was in default thereon for both principal and interest. The International Trust Company, through dealings with the Investors' Mortgage Security Company, had sold that company much paper, and was acting as its agent for collections. There had been some correspondence and conversation between the officers of the International Trust Company and Gordon about paying the interest of this note when it became due on June 12, 1893, and about the International Trust Company, as agent for the Investors' Mortgage Security Company, giving

Gordon an extension on said note. On June 12, 1893, the International Trust Company remitted the accrued interest of $1,750 to Cuyler, Morgan & Company, the New York City agents for the Investors' Mortgage Security Company; which interest was paid by Gordon to the Trust Company a few days thereafter, viz., on June 19, 1893.

In support of its claim to the ownership of the Gordon note, the Trust Company introduced certain letters and telegrams which passed between the Trust Company and the Investors' Mortgage Security Company, beginning on May 26, 1893, and continuing until September 27, 1893.

The entire negotiations with the Investors' Company upon which the Trust Company bases its claim to having repurchased the Gordon note, and having reacquired an insurable interest in the property as required by the policy, is evidenced by this correspondence.

XV.

The correspondence between the International Trust Company and the Investors' Mortgage Security Company relative to the collection and repurchase of the Gordon note, is as follows:

On May 26, 1893, Cuyler, Morgan & Company wrote—as New York representatives of the Investors' Company—the International Trust Company, saying:

"We hold note No. 1026, signed 'John R. Gordon,' due June 12th, for $50,000, with coupon attached for $1,750. Please inform us if you will send cheque to us to take up this note, or if we shall forward the same to you for collection. Your prompt reply will oblige."

On May 29th the International Trust Company wrote Cuyler, Morgan & Company as follows:

"Your two letters of the 26th inst. received. The Gordon note for $50,000, with coupon attached for $1,750, due 12th of June, you will kindly forward to this office for collection. Do not endorse the bill and coupon to our order, but simply forward them as they are, and oblige."

On June 2, 1893, Cuyler, Morgan & Company wrote the International Trust Company, saying:

"We are in receipt of your favor of the 29th ultimo con-tents of which we have noted, and we beg to advise yo[illegible] we are to-day forwarding to your good selves for collection under registered cover and seal of our notary, the Gordon note for $50,000, with coupon for $1,750, due June 12th, attached."

On the same date Cuyler, Morgan & Company transmitted the note, with letter of enclosure, as follows:

"We enclose herein, under registered cover and seal of our notary, Mr. J. M. French, the undermentioned securities:

"Note John R. Gordon, dated December 12, 1892, due June 12th, 1893, in favor of yourselves, for $50,000, with coupon attached, due same date, for $1,750, together amounting to $51,750, for collection and remittance."

On June 7, 1893, the International Trust Company wrote Cuyler, Morgan & Company as follows:

"This is to acknowledge receipt of your valued favor of the 2d inst., enclosing the note of John R. Gordon for $50,000, and attached coupon for $1,750, for collection as stated."

On June 12, 1893, the International Trust Company wrote Cuyler, Morgan & Company as follows:

"In regard to the loan of John R. Gordon, held by the Investor's Mortgage Security Company, Limited, for $50,000, we beg leave to advise you that, as we were authorized to reinvest the money, we have arranged to extend the loan six months, and herewith enclose you New York draft, No. 258, on the State Trust Company, for $1,750, interest to date. Be kind enough to acknowledge receipt."

On June 12, 1893, Cuyler, Morgan & Company telegraphed the International Trust Company as follows:

"Is Gordon note paid? Wire."

On June 12, 1893, the International Trust Company answered the above telegram as follows:

"It is understood we were to reinvest money. Not instructed to the contrary, consequently arranged six months' extension loan. Interest remitted to-day. Wired Investor's Company, if they desired, we will take loan ourselves within short while."

And on same date wrote as follows:

We have just sent you draft for interest on the loan of Gordon on account of the Investor's Mortgage and Security Company, and received your telegram asking if Gordon note was paid, to wire. We judge from that that there was some expectation of the note being paid and remittance made for other purposes, and we consequently wired you to the effect that we understood that we were to reinvest the money, and as no instructions to the contrary had been received, we had arranged six months' extension of the loan, and we have wired the Investor's Company that if they desired it, we will take up the loan ourselves as soon as possible—probably in a few weeks. At the time the money was placed in our hands, it was distinctly understood that we should reinvest it at the expiration of the Gordon loan, and as Mr. Gordon desired an extension, and we had no contrary instructions, we felt authorized to agree to the same. We, however, never wish our correspondents to be dissatisfied, and if the Investor's Company wishes the money, we will take the loan off their hands. We would do so immediately, but for the fact that money is very tight out here, and we have arranged to use all the money we can spare for the next few weeks. It may be that within the next ten days we will take up the loan and remit to you."

On June 15, 1893, Cuyler, Morgan & Company wrote the International Trust Company as follows:

"We beg to acknowledge receipt of your two favors of 12th inst., with remittance of $1,750, being interest due on Gordon $50,000 account of Investor's Mortgage Security Company, for which we thank you. We note the contents of your letters, and are writing the Investor's Company in this connection."

On May 31, 1893, Guild & Shepherd, the home secretaries of the Investor's Company, wrote from Edinburgh to the International Trust Company regarding some others, and in regard to the Gordon loan, said:

"We are so short of funds at present, that on the repayment of the Pueblo loan on the 12th prox. we shall require the money at our bankers in New York. Yours truly,

GUILD & SHEPHERD.

"P. S.—When the Pueblo loan has been repaid and remitted to New York, you might kindly cable the word 'Pueblo.'"

This letter was received by the International Trust Comp on June 12, 1893.

On June 12, 1893, the International Trust Company telegraphed Guild & Shepherd as follows:

"Cuyler wires about payment Gordon note. Presuming we are to reinvest, arranged six months' extension. Can take loan ourselves soon, if desired. Wait my letter of this date."

On the same date, June 12th, the International Trust Company wrote Guild & Shepherd as follows:

"This morning we received a message from Messrs. Cuyler, Morgan & Company, asking if the Gordon note had been paid, and to wire answer. In reply we sent telegram, copy of which we herewith enclose you. At the same time we wired you copy of telegram herewith enclosed. You will remember that at the time this loan was made we agreed to reinvest the money for you, and it was our distinct understanding that you desired us so to do. We have heretofore received no instructions to the contrary, and we naturally presumed that you wish your money to remain reinvested; and, as Mr. Gordon has been unable, on account of the extreme tightness of the money market and the difficulty in getting money, he applied for an extension, and we had arranged to extend his loan six months. Although, as stated herewith, we understood that we were authorized to reinvest this money, which, in my opinion, would cover an extension of this loan, but we wish you to be entirely satisfied in regard to it, and I am therefore authorized by our executive committee to say that we will just as soon as possible take up the Gordon loan ourselves, if you desire it, and remit the money to Cuyler, Morgan & Company, to your credit.

"Please wire us upon receipt of this letter, what your wishes are in the premises, and we will arrange to conform to them.

"P. S.—We remit to Cuyler, Morgan & Company $1,750, interest on above loan."

On June 13, 1893, the International Trust Company wrote Guild & Shepherd as follows:

"Referring to our letter and telegram of yesterday, we beg to say that we are just in receipt of your favor of May 31st, in which you say as follows, to-wit:

"'We are so short of funds at present that, on the repayment of the Pueblo loan on the 12th prox., we shall require the money at our bankers in New York.'

"I greatly regret that we did not receive such instructions a little earlier, as we could have arranged to let you have the money promptly on the 12th; but, as you will remember, when we made the Gordon loan, it was understood that we were to reinvest this money, and, if we had not arranged to extend the loan to Mr. Gordon, we should, in the absence of instructions to the contrary, have arranged for reinvestment, so that you would not lose any interest. Confirming my letter of yesterday, the best that I can do under the circumstances is to say that we will, ourselves, just as soon as possible, if you desire it, take up the loan and carry it ourselves. We would do so immediately but for the fact that times have been very hard here, and we have been compelled to renew loans, and to carry our customers for considerable amounts, which makes us pretty short in funds at present; but we are expecting some large loans to be paid between now and the 1st of July. You need not have the least anxiety about this loan or security, for, whilst we do not legally guarantee any loans, we always stand back of our correspondents, and protect them, and at any time we would rather take up a loan than to have them dissatisfied. To be perfectly frank, it would be quite inconvenient for us to take up this loan at present, as we need all of our money, and, if entirely agreeable to you, we would like to have the privilege of taking it up at any time within sixty days from its maturity—viz., at any time before August 12th.

"We remitted yesterday to Messrs. Cuyler, Morgan & Company $1,750, the interest upon this loan for the past six months. Notwithstanding the hard times, the general condition of this state is good, and I think Denver may boast of the best condition of any city of its size in the United States. The fall in our silver was largely discounted, and we have no fear here of anything more than a dullness and a depression for a time.

"Awaiting your further advice and wishes."

On June 14, 1893, Guild & Shepherd wrote the International Trust Company as follows:

"We beg to confirm the following cable message, which we received from you on the 13th, inst:

"'Cuyler wires about payment Gordon note. Presuming we to reinvest, arranged six months' extension. Can take loan ourselves, soon, if desired. Wait my letter of this date.'

"We accordingly await your letter."

On June 26, 1893, Guild & Shepherd cabled the International Trust Company as follows:

"Have received your letter 13th of June. We will delay until 15th of September."

This cable received June 26th.

On the same date, June 26, 1893, The International Trust Company wrote Guild & Shepherd as follows:

"We are in receipt this morning of cablegram from you, as follows:

"'Candidness bedroom gayness benefit,' which translated means, as we make it, 'Have received your letter of the 13th of June. We will delay until the 15th of September.'

"This is satisfactory to us, and we will arrange to take up the loan at that time. We would do so now, but as we wrote you, it would be quite an inconvenience for us, in view of the hard times.

"We have the note here, and would suggest that as we are to take it up, that we hold it for the present, and send to you to be endorsed over to us. The note now stands in your name, consequently we will wish it endorsed to us when we take it up.

"Thanking you for your courtesy, and regretting that we should have misunderstood your wishes in this matter, I am, Yours truly."

Under date of June 28, 1893, Guild & Shepherd, secretaries, wrote the International Trust Company as follows:

"EDINBURGH, 28th June, 1893.

Loan p. $50,000, John Gordon.

"DEAR SIR—We were duly favored with your letters of 12th and 13th inst., and had, also, your cable of the former date. Your letters were submitted to the directors at their board meeting on the 26th inst., and they ask us to say that they regret exceedingly that their commitments will necessitate their asking repayment of this loan. We regret that we did not give you earlier intimation, but when you mentioned at the time you made the loan that you would be able to reinvest, we did not consider that it was actually agreed between us that you were to reinvest without further communication. On this point we should, perhaps, have made matters more clear, and we regret that we did not do so. Our directors ask us to thank you for your kind offer to relieve them of this loan. They do not desire to inconvenience you by asking you to relieve them of it at this present time, but they would like that you should make such arrangements as would enable you to take it over from us at a date not later than 15th September next. When you do so take it over, we shall be obliged if you will kindly place the amount, with interest to that date, to the credit of our account with Cuyler, Morgan & Company. We think we already explained to you that we hope to be able to lend further in the spring of next year, and we shall keep your claims to a portion of the amount which we then hope to be able to place before our board.

"Thanking you for your assistance in this matter, we are,"

The letter of June 28th was received by the International Trust Company, July 15, 1893.

On July 21, 1893, the International Trust Company wrote the Investors' Company, saying:

"In anticipation of the fact that we expect to take up the loan to John R. Gordon of $50,000, I send you herewith note to be endorsed by you to us. In endorsing the same, please endorse it to John F. Bell, trustee, instead of directly to the company. You might send it back to us direct, unless there is some objection, and we will hold the same and be responsible for it. We hope to be able to take up this loan as we proposed, promptly on the 15th of September; but if times continue as they are now, we may be compelled to ask some further indulgence from your company, but will be prepared to give you ample security if you desire it. I do not say this in anticipation of the fact that we shall do so, but simply because in the present condition of affairs here, it is absolutely impossible to collect money. We are carrying our people, and pushing them would simply mean ruin to them, and a greater delay in getting our money."

On August 5, Guild & Shepherd, secretaries, wrote the International Trust Company, saying:

"We are in receipt of your letter of the 21st ulto., enclosing note for $50,000, by John R. Gordon, to be endorsed by this company to you. The note will be endorsed at the next meeting of the directors to be held on Wednesday, the 9th inst., and thereafter returned to you."

And on August 9, 1893, Guild & Shepherd wrote the International Trust Company, saying:

"John F. Bell, Secretary The International Trust Company,
Denver, Colorado, U. S. A.:

"Dear Sir—The directors at their meeting to-day authorized the indorsation of this note to you as trustee, and we now send same herewith so indorsed. Kindly acknowledge receipt of same and hold it for collection. We trust that it will not put your company to any great inconvenience to make payment of the same on the 15th of next month. We think that we already explained to you that our reason for asking you to relieve us of this loan was that we close our books for the year about then, and wish the payment for other engagements which we have to meet before the balance.

"We have to acknowledge receipt of your letter of the 15th ult., enclosing statement of remittances to Messrs. Cuyler, Morgan & Company, which we have examined and found correct. We have, also, your letter of the 24th ulto., and are glad to know that you can give such a good account of your position. So far as we know, nothing of the report you refer to got into the papers on this side."

The endorsement upon the note made by the Investors' Company was as follows:

"Pay John F. Bell, Trustee, for Investors' Mortgage Security Company, L't'd.

"GUILD & SHEPHERD,
"Secretaries."

On August 22nd, the International Trust Company wrote Guild & Shepherd as follows:

"Your favor of the 9th inst. received along with Gordon note for $50,000. I have also a letter from Mr. R. H. Guild, and we will be very much pleased to have him spend a few days with us next month."

On September 5, 1893, the International Trust Company wrote Guild & Shepherd as follows:

"I am in receipt of your letter of August 21st, in which you state that your directors have consented to extend the Gordon loan for one year from September 15th, at 9 per cent interest, we giving our obligation for the same, and placing in the hands of your bankers in New York, as security, the Gordon note for $50,000, and such additional collateral as will be satisfactory to you. I must frankly admit that we are extremely adverse to paying as high a rate of interest as 9 per cent a year, and I had hoped that in view of our prompt action in assuming personally this loan (although we were not legally liable for the same), that your directors would deal somewhat more liberally with us; still, we would prefer to pay 9 per cent for a short time rather than to be forced to distress our customers in the present financial condition of the country. In view of the high rate of interest, however, we wish to have the privilege of paying at the end of any three months whatever amount we may find convenient, with interest to date, which will then be credited upon the notes. We think we are fairly entitled to this under all the circumstances. Upon September 15th we will, if possible, make a remittance on account, and fix up the balance in the manner agreed upon."

(The letter of August 21st is not in evidence.)

On September 22, 1893, Guild & Shepherd wrote the International Trust Company as follows:

"We have your letter of the 5th inst., which was submitted to our directors at their meeting on Wednesday. They feel highly gratified at the way in which you have treated us in this loan, and would have been glad had it been possible to accept 7 per cent interest. Unfortunately, the crisis which has been felt so keenly by you has not been without its effects here, and the fact of our not getting payment of this loan and some other loans which we were depending upon has forced us to sacrifice securities in our hands by realizing in the present depressed state of the market, so that, in the circumstances, they feel it necessary to ask a higher rate of interest. They, however, fall in willingly with your request to have the privilege of paying at the end of any three months whatever amount you may find convenient, with the interest to date, which will be credited upon the note. We note that upon the 15th of this month you hope to make such a remittance to account which will meet with our views. Regretting that we are unable to accept of terms which would be more favorable, we remain."

September 23, 1893, the International Trust Company wrote Guild & Shepherd as follows:

"Referring to your letter of the 21st of August in reference to the Gordon loan and to our letter of September 5th in reference to the matter, I beg leave to say that we to-day send to Cuyler, Morgan & Company a remittance of $10,000 on account, with interest on the Gordon loan from June 12 to September 12, and our note for $40,000, payable on or before one year. As collateral for said loan, we send the Gordon note, and two other notes amounting to $11,000, making the collateral held for our loan $61,000. Instead of dating our loan September 15th, we dated it September 12th, on account of that being the time when the quarterly interest is due, and I herewith send you a copy of the note as sent to Cuyler, Morgan & Company. We arranged this matter with Mr. R. H. Guild, who was recently in this city, and he was satisfied with the additional collateral which we have sent on. You will note further, by the copy of note sent you, that according to our letter, we reserve the right to pay at the end of any three months any portion of this loan. On account of pressure of business we are not able to send you to-day as complete statement of this matter and of other matters as you desire by your letter of September 13th, which I received this morning, but will do so by the next mail.

"Trusting that this matter is arranged satisfactorily to you."

On September 27, 1893, Guild & Shepherd wrote as follows:

"We beg to confirm the following cable, which we received from you on the 24th inst., viz.: 'Decussate Cuyler adverb dollars account Gordon,' the interpretation of which is: 'Have remitted to-day to Cuyler, Morgan & Company, $10,000 on account of the Gordon loan.'

"On 9th August we sent you out the Gordon note endorsed to you as trustee. We presume you have endorsed on the note the $10,000 paid to account. The interest on this sum and the balance to be paid will be calculated afterwards, and we presume you do not wish us to take off this sum the interest to date, but as to this, perhaps you might write us. We shall be glad to hear from you.

"P. S.—We shall also be glad to hear from you as to the lodging of the proposed securities with Messrs. Cuyler, Morgan & Company, of New York."

XVI.

The following is a copy of said note, with all endorsements thereon:

"Due 12th June, 1893.

"The International Trust Company.

"$50,000. Denver, Colorado, December 12, 1892.

"On the 12th day of June, A. D. 1893, for value received, I promise to pay to the order of the International Trust Company the principal sum of $50,000 in gold coin, with interest thereon at the rate of seven (7) per cent per annum from date until maturity, payable semi-annually, according to the tenor of one (1) interest notes hereto attached bearing even date herewith, both principal and interest payable at the office of the International Trust Company, Denver, Colorado.

"This note bears interest from maturity until paid, at the rate of ten (10) per cent per annum. On failure to pay any installment of interest when due, the holder may collect the principal and interest at once.

"No. 1026. JOHN R. GORDON.

"Note—This note is secured by trust deed on lots Nos. 11 to 16, inclusive, block 126, in South Pueblo."

Endorsed: "Gordon. No. 541. $50,000. Coupon Trust Deed Note. Interest and principal payable at the office of the International Trust Company, Denver, Colo."

"For value received, we hereby transfer and assign the within note, together with all interest in and all rights under the trust deed securing the same, to the Investors' Mortgage Security Company, Ld., without recourse.

"THE INTERNATIONAL TRUST COMPANY,
"By John F. Bell, Secretary."

"Pay John F. Bell, Trustee, for Investors' Mortgage Security Company, Limited.

"GUILD & SHEPHERD, Secretaries."

"Pay the International Trust Company, or order, without recourse.

"JOHN F. BELL, Trustee."

"By Colorado laws the property securing the note is conveyed to a trustee, who holds it in trust for the note holder until the note is paid. If the interest or principal is not paid, the property may be sold, four weeks' newspaper notice being required. The transfer of the note carries the trust deed with it, no other transfer being necessary."

Coupon:

"The International Trust Company, Denver, Colo.

"$1,750. DENVER, COLO., Dec. 12th, 1892.

"On the 12th day of June, 1893, for value received, I promise to pay to the order of the International Trust Company, seventeen hundred fifty dollars, at the office of the International Trust Company, Denver, Colo., being the interest due on a principal note, No. 1026, for $50,000, of even date herewith. This note bears interest from maturity until paid at the rate of ten per cent per annum.

"No. 1. JOHN R. GORDON."

Endorsed:

"Loan No..... secured by trust deed on ...... Pay to the order of................, without recourse."

XVII.

The policy in suit is what is known in current underwriting as the New York Standard form of policy, and is the form of policy adopted by statute in the State of New York, Pennsylvania, New Jersey, Michigan, Wisconsin, North Dakota and South Dakota. And it is also the form of policy now adopted and in general use by fire insurance companies throughout the other States of the Union.

The mortgage clause attached to the policy and set out in the complaint is a modification of what is known as the Union or Standard mortgage clause. The Union or Standard mortgage clause is the form of clause adopted by statute in the above named states. The policy and mortgage clause combined constitute what is generally known as the "Standard Policy with Mortgage Clause Attached."

The mortgage clause is as follows:

"WHEREAS, The property described in this policy has been conveyed to M. D. Thatcher, in trust, to secure the payment of a certain indebtedness to the International Trust Company, Denver, Colorado;

"AND, WHEREAS, The owner of the policy has requested that the loss, if any, be made payable to the said company; therefore, the loss, if any, is made payable to the International Trust Company, Denver, Colorado, and its assigns.

"IT BEING HEREBY UNDERSTOOD AND AGREED, That this insurance, as to the interest of the mortgagee or trustee only therein, shall not be invalidated by any act or neglect of the mortgagor or owner of the property insured, nor by the occupation of the premises for purposes more hazardous than are permitted by the terms of this policy. Provided, that in case the mortgagor or owner neglects or refuses to pay any premium due under this policy, then, on demand, the mortgagee or trustee shall pay the same. Provided, also, that the mortgagee or trustee shall notify this company of any change of ownership or increase of hazard which shall come to his or their knowledge, and shall have permission for such change of ownership or increase of hazard duly endorsed on this policy. And provided, further, that every increase of hazard not permitted by the policy to the mortgagor or owner, shall be paid for by the mortgagee or trustee on reasonable demand, and after demand made by this company upon, and refusal by the mortgagor or owner to pay, according to the established schedule of rates. It is, however, understood that this company reserves the right to cancel this policy, as stipulated in the printed conditions of said policy; and, also, to cancel this agreement on giving ten days' notice of its intention to the trustee or mortgagee named therein, and from and after the expiration of the said ten days this agreement shall be null and void. It is further agreed that in case of any other insurance upon the property hereby insured, then this company shall not be liable, under this policy, for a greater portion of any loss sustained than the sum hereby insured bears to the whole amount of insurance on said property, issued to, or held by any party or parties having an insurable interest therein. It is also agreed that whenever this company shall pay the mortgagee or trustee any sum for loss under this policy, and shall claim that as to the mortgagor or owner no liability therefor exists, it shall at once and to the extent of such payment be legally subrogated to all the rights of the party to whom such payment shall be made, under any and all securities held by such party for the payment of said debt. But such subrogation shall be in subordination to the claim of said party for the balance of the debt so secured. Or said company may, at its option, pay the said mortgagee or trustee the whole debt so secured, with all the interest which may have accrued thereon to the date of such payment, and shall thereupon receive from the party to whom such payment shall be made an assignment and transfer of said debt, with all securities held by said parties for the payment thereof.

"In testimony that the foregoing provisions are made a part of Policy No. 4475189, of Sun Insurance Office Insurance Company of London, to which they are attached, witness my hand at Pueblo, Colo., this 14th day of June, A. D. 1893.

"HENRY O. MORRIS, Agent.

"Accepted and agreed to by

"THE INTERNATIONAL TRUST COMPANY.

"By HENRY W. HOBSON, Vice-Pres."

The other clause attached to the policy is what is known as "the loss payable clause." The record will show that both clauses were attached at the same time.

The loss payable clause is as follows:

"Loss, if any, payable to M. D. Thatcher, trustee, for the International Trust Company of Denver, Colorado, as his interest may appear. (Their regular subrogation clause attached to the policy.)"

Among the provisions of the policy are the following:

"This entire policy, unless otherwise provided by agreement endorsed hereon or added hereto, shall be void * * * if any change other than by the death of an insured take place in the interest, title or possession of the subject of insurance, except change of occupancy without increase of hazard, whether by legal process or judgment, or by voluntary act of the insured, or otherwise."

"This company shall not be liable beyond the actual cash value of the property at the time any loss or damage occurs, and the loss or damage shall be ascertained or estimated according to such cash value; * * * said ascertainment or estimate shall be made by the insured and this company, or, if they differ, then by appraisers, as hereinafter provided; and, the amount of loss or damage having been thus determined, the sum for which this company is liable pursuant to this policy shall be payable sixty days after due notice, ascertainment, estimate and satisfactory proof of the loss have been received by this company in accordance with the terms of this policy."

"If fire occur, the insured shall give immediate notice of any loss thereby in writing to this company, protect the property from further damage, forthwith separate the damaged and undamaged personal property, put it in the best possible order, make a complete inventory of the same, stating the quantity and cost of each article and the amount claimed thereon; and within sixty days after the fire, unless such time is extended in writing by this company, shall render a statement to this company, signed and sworn to by said insured, stating the knowledge and belief of the insured as to the time and origin of the fire; the interest of the insured and of all others in the property; the cash value of each item thereof and the amount of loss thereon; all incumbrances thereon; all other insurance, whether valid or not, covering any of said property; and a copy of all the descriptions and schedules in all policies; any changes in the title, use, occupation, location, possession or exposures of said property since the issuing of this policy; by whom and for what purpose any building herein described and the several parts thereof were occupied at the time of fire."

"In the event of disagreement as to the amount of loss the same shall, as above provided, be ascertained by two competent and disinterested appraisers, the insured and this company each selecting one, and the two so chosen shall first select a competent and disinterested umpire; the appraisers together shall then estimate and appraise the loss, stating separately sound value and damage, and failing to agree, shall submit their differences to the umpire, and the award in writing of any two shall determine the amount of such loss; the parties thereto shall pay the appraiser respectively selected by them, and shall bear equally the expenses of the appraisal and umpire."

"This company shall not be held to have waived any provision or condition of this policy or any forfeiture thereof by any requirement, act, or proceeding on its part relating to the appraisal or to any examination herein provided for, and the loss shall not become payable until sixty days after the notice, ascertainment, estimate and satisfactory proof of the loss herein required have been received by this company, including an award by appraisers when appraisal has been required."

"No suit or action on this policy for the recovery of any claim shall be sustainable in any court of law or equity until after full compliance by the insured with all the foregoing requirements, nor unless commenced within twelve months next after the fire."

"If, with the consent of this company, an interest under this policy shall exist in favor of a mortgagee or of any person or corporation having an interest in the subject of insurance other than the interests of the insured, as described herein, the conditions hereinbefore contained shall apply in the manner expressed in such provisions and conditions of insurance relating to such interest as shall be written upon, attached or appended hereto."

XVIII.

At the trial of the case in the Circuit Court, and at the close of the testimony, and prior to any findings of fact being made, the defendant made a request that the Court rule as a matter of law upon the evidence, that from the correspondence between the International Trust Company and the Investors' Mortgage Security Company, Limited, relative to the repurchase of the Gordon note, and from all the testimony and evidence relative thereto, the ownership and title to the said Gordon note did not vest in the International Trust Company until after the issuing of the defendant's policy, which request was by the Court refused, and to the refusal of the Court the defendant then and there excepted. The defendant also thereupon requested the Court to rule as a matter of law that the International Trust Company did not have an insurable interest in the property or in the indebtedness at the time of the issuing of defendant's policy, which request was by the Court refused, and to the refusal of the Court so to rule, the defendant then and there excepted. The defendant also asked for a ruling upon the evidence that the Trust Company did not have such an insurable interest either in the property or in the indebtedness at the time of the issuing of the policy as was sufficient in law to sustain the policy, and did not have the insurable interest required by the terms of the policy and mortgage clause; which request the Court denied, and to the ruling of the Court denying such request, defendant then and there duly excepted.

The defendant also, at the conclusion of the testimony, moved the Court for a finding and judgment for the defendant company, upon the ground that the evidence is insufficient to show a cause of action in favor of the plaintiff company, or to support a finding for the plaintiff company, or to support a judgment entered upon such finding for the plaintiff company; which motion the Court overruled; to which ruling of the Court the defendant then and there duly excepted. The defendant also excepted specifically to the seventh special finding made by the Court in the words as follows, to-wit:

"And defendant further excepts specifically to the seventh finding of fact made by the Court, on the ground that said special finding of fact as to the ownership of said Gordon note, is a conclusion of law from the evidence and not a finding of fact, and because the finding that the International Trust Company had an insurable interest at the time of the issuing of the policy, is a conclusion of law, and not a finding of fact, and because it was shown by the evidence that the entire negotiations relating to the purchase of the Gordon note by the International Trust Company were conducted by correspondence, which is in evidence and fully set forth in the record, and that said correspondence and all the evidence relating thereto shows as a matter of law that the ownership and title to said note was not acquired by nor vested in the International Trust Company at the time the policy of defendant was issued, and because said correspondence and all the evidence relating thereto shows as a matter of law that the International Trust Company did not have at the time said policy was issued, a valid, legal or sufficient insurable interest in the property or in the indebtedness to support the policy and mortgage clause, and did not have the insurable interest required and called for by the policy and mortgaged clause."

And to the making by the Court of said special finding over the objection of the defendant, the defendant then and there duly excepted.

The defendant also excepted to the thirteenth, fourteenth, eighteenth, nineteenth, twentieth, twenty-first, twenth-second, and twenty-third special findings of fact made by the trial court.

XIX.

In the Circuit Court of Appeals, with respect to the said 7th special finding of fact, the Court said:

"This finding of the trial Court is conclusive in this Court and cannot be reviewed. It matters not, we think, that the finding in question is based largely upon letters and telegrams which passed between the Trust Company and the Investor's Mortgage Security Company, and upon deductions drawn from such correspondence. A special finding of fact, as was said by Mr. Justice Miller in Burr vs. Des Moines Nav. & R. R. Co., 1 Wallace, 99, 102, 'is a statement of the ultimate facts or propositions which the evidence is intended to establish, and not the evidence on which those ultimate facts are supposed to rest. The statement must be sufficient in itself, without references or comparisons, or balancing of testimony, or weighing evidence, to justify the application of the legal principles which must determine the case. It must leave none of the functions of a jury to be discharged by this Court, but must have all the sufficiency, fullness and perspicuity of a special verdict. If it requires of the Court to weigh conflicting testimony, or to balance admitted facts, and deduce from these the propositions of fact on which alone a legal conclusion can rest, then it is not such a statement as this Court can act upon.' See also Hinkley vs. City of Arkansas City, 69 Fed. Rep. 768, 771; Id., — U. S. App. —. It results from this view that when a trial court is called upon to state the ultimate proposition of facts established by the evidence, in the form of a special finding, it will often be compelled to embody in the finding some legal inferences as well as inferences of fact. Such will generally be the case when, as in the present instance, the ultimate fact to be found relates to the acquisition of ownership of property. We think, therefore, that the conclusive effect of a special finding of fact cannot be made to depend upon the character of the proof upon which it rests. If such a finding is regarded as conclusive and not subject to review when it rests on oral testimony, it must be regarded as equally conclusive when it rests upon written evidence, or on evidence that is in part written and in part oral. The rule is inflexible in the Federal Courts that when a jury is waived and the Court makes a special finding, an Appellate Court cannot look into the evidence on which the finding is based, except for the purpose of ascertaining whether an error was committed in admitting or excluding testimony. Stanley vs. Supervisors of Albany, 121 U. S. 535, 547; Walker vs. Miller, 19 U. S. App. 403; Id., 8 C. C. A. 331; Searcy County vs. Thompson, 13 C. C. A. 349. In the present cases no objection was made to the evidence on which the finding in question was based, nor was the Court asked to reject or to exclude the evidence after it had been introduced on the ground that it had no tendency to show that the Trust Company had an insurable interest in the insured property when the policies in controversy were issued. On the contrary, the case was tried on the evident assumption that the evidence in question had some tendency to establish the existence of an insurable interest, and the objection now urged is in substance that the finding made by the trial Court was against the weight of the evidence. It goes without saying that we cannot notice an objection of that character. Hartford Life Annuity Insurance Co. vs. Unsell, 144 U. S. 439, 451."

To this view of the majority of the Court, Sanborn, J., dissented and said:

"I am unable to concur in the view taken by the majority of the Court, that the question whether or not there was any evidence sufficient to support a finding that the International Trust Company, of Denver, the defendant in error, had an insurable interest in the property destroyed was not presented for our consideration by the record in these cases. At the close of the evidence, counsel for plaintiff in error moved the Court for a finding and judgment in its favor, 'upon the ground that the evidence is insufficient to show a cause of action in favor of the plaintiff company, or to support a judgment entered upon such finding for the plaintiff company,' and this motion was denied and an exception to this ruling of the Court was taken. In my view, this motion had the same effect that a request to the Court to instruct the jury peremptorily to find for the defendant would have had if the trial had been before a jury. It is not necessary to pass upon the weight or the sufficiency of the evidence to determine this question of law. It is to be decided like a question which arises upon such a request to the jury—upon the concession that the motion must be denied, if there is evidence in the record sufficient to sustain a finding for the plaintiff. Revised Statutes, section 700; Clement vs. Insurance Company, 7 Blatch. 51, 53, 54, 58; Lehnen vs. Dickson, 148 U. S. 71, 72, 78; Martinton vs. Fairbanks, 112 U. S. 670, 671, 672; St. Louis vs. Western Union Telegraph Company, 148 U. S. 92, 96; Mercantile Trust Company vs. Wood, 5 C. C. A. 658; 60 Fed. Rep. 346, 348; Searcy County vs. Thompson, 13 C. C. A. 349, 354 to 358; 66 Fed. Rep. 92.

"As all the evidence relating to the insurable interest of the defendant in error consisted of letters contained in the record, this motion, in my view, raised the question whether or not all reasonable men, upon the perusal of those letters, would, in the exercise of a sound and unprejudiced judgment, come to the conclusion that these letters did not show that the defendant in error had an insurable interest in the property destroyed."

XX.

The Court of Appeals further said upon this branch of the case:

"But even if the special finding now under consideration was open to review by this Court, we should not be able to say that the Circuit Court erred in finding that the Trust Company had such an insurable interest as was sufficient to support the policies. In the case of The International Trust Company vs. The Norwich Union Fire Insurance Society, we have held that the Trust Company had an insurable interest on June 26, 1893, by virtue of the consummated agreement with the Investors' Mortgage Security Company to take up the Gordon note which was secured by a deed of trust on the insured property. It was further shown in these cases that on June 12, 1893, the Trust Company had advanced and paid the interest on said note, amounting to $1,750, and we think it most probable, in view of the relations then existing between the Trust Company and the Mortgage Company, that the payment so made gave the former company such an interest in the note and deed of trust as would serve to support a policy covering the mortgaged property which was taken out after that date."

XXI.

With respect to the loss payable clause attached to the policy, the Court of Appeals said:

> "In the policy issued by the Sun Insurance Office of London, England, there appear to have been two mortgage clauses attached to the policy. The first of these clauses was as follows: 'Loss, if any, payable to M. D. Thatcher, trustee for the International Trust Company of Denver, Colorado, as his interest may appear,' whereas by the second mortgage clause the loss was made payable directly to the International Trust Company. The second clause is a more full and complete contract between the mortgagee and the Insurance Company, being in substance the same mortgage clause that was construed by this court in Syndicate Insurance Company vs. Bohn, supra.
>
> "The point is made that the first of these mortgage clauses controls the second, and that as the first clause does not exempt the Trust Company from liability for the acts of the mortgagor, the policy of the Sun Insurance Office was avoided by the sale made by the mortgagor on July 3, 1893. We cannot assent to this view. The second mortgage clause being more full and complete, and the last apparently to be attached to the policy, should be taken, we think, as containing the latest expression of the intentions of the contracting parties. We are of the opinion, therefore, that the last clause supersedes and controls the former so far as they are in conflict."

XXII.

Your petitioner is advised and believes that the said judgment of the Circuit Court of Appeals in said cause is erroneous, and that this Honorable Court should require the said cause to be certified to it for its review and determination under and in conformity with the provisions of the sixth section of the act of Congress entitled "An Act to establish Circuit Court of Appeals, and to define and regulate in certain cases the jurisdiction of the Courts of the United States, and for other purposes." Approved March 3, 1891, the said case being made final in the said Circuit Court of Appeals by the said act, jurisdiction being acquired solely by virtue of the diverse citizenship of the parties.

XXIII.

The questions involved in this case affect the very foundations of underwriting. The contractual rights of the underwriter and the mortgagee and the mortgagor are involved in the settling of the construction to be given to a policy containing a mortgage clause such as that attached to the policy in this case. The Court is asked to determine whether the mortgage clause is to be regarded as collateral to the policy itself, or whether it constitutes of itself a principal contract for insurance based directly upon the interest of the mortgagee or payee. The great majority of insurance companies doing business in the United States are now using a clause similar to the mortgage clause in this case. Its use is rendered necessary to meet the exigencies and peculiarities of the business of fire insurance. "The combination of these two instruments into one contract is an anomaly to the law of contracts and peculiar to the business of fire insurance. * * * It has a reason and foundation in the principles of underwriting, the preservation of which are essential to the integrity of the business, and its significance and purpose and importance may be recognized and appreciated only by due consideration of the history of underwriting as connected with the insurance of collateral interests. Insurances directly upon the interests of mortgagees, and on other collateral interests are eschewed by underwriters, because they leave the door open to double insurances beyond the insurable value of properties, and thereby add to the moral hazard involved to a degree which renders that form of insurances particularly dangerous and impolitic."

"The subject, therefore, is one deserving of grave consideration.

"The widespread use of the policy and mortgage clause attached makes it of great importance that there should be a uniformity in the decisions of the various Federal Courts before whom these contracts are in recent years being brought with growing frequency. The only way in which that uniformity of decision can be secured is by a consideration of this peculiar contract in its various aspects by this Honorable Court, and an authoritative declaration made as to the purpose, interpretation and construction of the contract, which shall stand as a guide to all inferior tribunals. This Court has at no time had before it for consideration contracts of this kind, and has never announced an opinion in regard to the construction thereof."

A second question presented is the nature and extent of the insurable interest acquired under an uncompleted agreement or negotiation for the purchase of collateral securities; which negotiation at the time of the issuance of the policy had only progressed to the extent of an offer of re-purchase on the one side, without the receipt of that offer by the other side. There is also involved the extent to which an inchoate interest in a promissory note, the nature of which interest is undisclosed and unknown to the insurer at the time of the issuance of the policy, will support an insurance which requires that the interest of the insured thereunder shall be a sole and unconditional ownership.

XXIV.

There is likewise presented the important question of whether litigants in general are entitled to have the Appellate Courts, viz., the Circuit Courts of Appeals, review questions affecting their rights, where those questions are presented by the record in the maner and form in which your petitioner brought up for review the questions relating to the legal effect of the correspondence between the International Trust Company and the Investors' Mortgage Security Company, upon which the International Trust Company bases its claim to the ownership of the Gordon note at the time the policy in suit was issued, and the insurable interest required to support in its favor the contract of insurance. The Circuit Court of Appeals for the Eighth Circuit is divided upon this question.

The question is also presented as to whether the existence of the insurable interest required by an insurance contract is to be determined from a correspondence as a question of fact, or whether the construction of the correspondence is a question of law; and, in general, whether the legal rights and obligations of parties which are to be determined wholly from writings in evidence present questions of law to be determined by the Court, or mere questions of fact, and whether they will be reviewed by the Appellate Court as questions of law; the Circuit Court of Appeals in this case holding that thereby only questions of fact are presented which they cannot review.

Your petitioner respectfully submits that under sections 700 and 649, Revised Statutes of the United States, the questions involving the construction of this correspondence are properly presented for review in the Appellate Court, contrary to the holding of the majority of the Circuit Court of Appeals.

XXV.

Another important question presented is whether a litigant, upon a record brought to the Circuit Court of Appeals in the manner and form in which your petitioner brought up for review the questions relating to the ascertainment of the amount of loss and the premature bringing of suit, is entitled to a review. The majority of the Circuit Court of Appeals held that he was not.

XXVI.

Another important question presented is whether where two mortgage clauses are attached to a policy of insurance, both, as the record shows, simultaneously with the execution of the policy, with no evidence in the record bearing upon the cause for the attachment of both to the policy, and no finding in regard thereto by the trial Court, the Circuit Court of Appeals shall construe the policy and both clauses according to their context, or whether the Court of Appeals can take whichever of the clauses in its judgment it sees fit; and whether where one of said mortgage clauses refers to the other and, in effect, states that the subrogation clause of the other mortgage clause is attached to the policy, the Circuit Court of Appeals is not bound to construe the whole of the clauses as a matter of law, and not find as a fact that one or the other of the clauses expresses the intentions of the parties.

XXVII.

Your petitioner thus respectfully submits that the questions involved in and presented by the said case of your petitioner should be authoritatively and finally adjudged by this Honorable Court, upon and after a full presentation to the Court of the merits of the said questions on the part of your petitioner, and of the defendant in error, the International Trust Company.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari may be issued out of and under the seal of this Court, directed to the United States Circuit Court of Appeals for the Eighth Circuit, commanding the said Court to certify and send to this Court, on a day certain to be therein designated, a full and complete transcript of the record, and all proceedings of the said Court of Appeals, in the said case therein, entitled The Sun Insurance Office, of London, England, Plaintiff in Error, vs. The International Trust Company, of Denver, Colorado, Defendant in Error, No. 663, to the end that the said case may be reviewed and determined by this Court as provided in Section 6 of the act of Congress entitled "An act to establish Circuit Courts of Appeals, and to define and regulate in certain cases the jurisdiction of the Courts of the United States, and for other purposes." Approved March 3d, 1891; or that your petitioner may have such other and further relief or remedy in the premises as to this Court may seem proper, and in conformity with the said act, and that the said judgment of the said Circuit Court of Appeals in the said case, and every part thereof, may be reversed by this Honorable Court. And your petitioner will ever pray, etc.

MILTON SMITH,
T. J. O'DONNELL,
W. S. DECKER,
Attorneys for Petitioner.

STATE OF COLORADO, } ss.
County of Arapahoe. }

Milton Smith, being first duly sworn, says that he is one of the attorneys for the Sun Insurance Office, of London, England, the petitioner above named, and as such has had personal charge for the said petitioner of the case in the foregoing petition mentioned, in the Circuit Court of the United States for the District of Colorado, and in the Circuit Court of Appeals for the Eighth Circuit; that he read the said petition by him subscribed, and that the facts therein stated are true to the best of his information and belief.

MILTON SMITH.

Subscribed and sworn to before me this 2d day of March, 1896.

My commission expires July 12th, 1899.

LINCOLN B. LIVINGSTON,
Notary Public.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1895.

THE SUN INSURANCE OFFICE OF LONDON, ENGLAND,
PLAINTIFF IN ERROR,
vs.
THE INTERNATIONAL TRUST COMPANY OF DENVER,
COLORADO, DEFENDANT IN ERROR.

ON PETITION FOR WRIT OF CERTIORARI.

To Messrs. A. C. Campbell and A. E. Pattison, Attorneys for the International Trust Company:

Please take notice that on the 10th day of March, A. D. 1896, at the opening of the Court, or as soon thereafter as counsel can be heard, the petition in the above entitled cause for a writ of certiorari, of which a copy is herewith furnished you, will be submitted to the Supreme Court of the United States, for the decision of the said Court thereon.

MILTON SMITH,
T. J. O'DONNELL,
W. S. DECKER,
Attorneys for the Sun Insurance Office, of London, England.

Service and copy of the within notice, and also of the petition for writ of certiorari received and acknowledged this 2d day of March, 1896, and March 10th is satisfactory to us for presenting said petition.

A. E. PATTISON,
A. C. CAMPBELL,
Attorneys for International Trust Company.

Office Supreme Court U. S.
FILED.
MAR 9 1896
JAMES H. McKENNEY,
CLERK.

IN

The Supreme Court

OF THE

United States.

OCTOBER TERM, 1895.

THE SUN INSURANCE OFFICE OF LONDON, ENGLAND.
Plaintiff in Error,
v.
THE INTERNATIONAL TRUST COMPANY, OF DENVER, COLO.
Defendant in Error.

923.

BRIEF OF PETITIONER UPON PETITION OF THE SUN INSURANCE OFFICE, OF LONDON, ENGLAND, FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

MILTON SMITH,
T. J. O'DONNELL,
W. S. DECKER,

C. J. KELLY, Printer, Denver.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1895.

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Plaintiff in Error,
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Defendant in Error.

BRIEF OF PETITIONER UPON PETITION OF THE SUN INSURANCE OFFICE, OF LONDON, ENGLAND, FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

This petition for a writ of certiorari asks this Honorable Court to cause the Circuit Court of Appeals for the Eighth Circuit to certify to this Court for its review and determination the above-entitled cause.

The grounds upon which the petition is based are very fully set out in the petition itself, to which we refer for a more complete statement of the case.

It should be observed in general that under the Act of 1891, establishing Circuit Courts of Appeals, practically no question relating to the construction of insurance contracts, however important, can be brought for review before this Court save by proceeding in certiorari. The act referred to practically shuts out from the consideration of this Court all questions belonging to the domain of insurance law, unless they be entertained by this Court in the manner here requested. Thus, a particular attention would seem to be merited to cases of this class, belonging to a branch of commercial enterprise and activity so vast in its proportions and involving interests of so great magnitude.

The writ, if granted, would bring up for review the decisions, State and Federal, in conflict with the decision of the Court of Appeals in the case at bar, as to the questions here presented.

In this brief we desire to present for the consideration of this Court such a review of the questions involved and the authorities bearing thereon as shall enable this Court to determine whether the matters involved are of sufficient gravity and general importance, and present questions of such novelty and difficulty as to merit the granting of the writ prayed for.

If the brief is more exhaustive than the practice demands for the purposes of the present proceeding, it will, we may assume, be none the less effective on that score for the purpose for which it is here presented.

This is a suit at law upon a policy of fire insurance issued June 14th, 1893, by the petitioner to one John R. Gordon, with mortgage clause attached, as set out in the petition. The case was tried to the Court without a jury. The trial Court made a number of special findings of fact.

The plaintiff in error maintains that this Court should grant this application for writ of certiorari and a review of the proceedings had in the Court of Appeals, and in the nisi prius Court, (1) on the broad ground that where valuable property rights are involved, it is due to the litigant that the mistakes and errors of the nisi prius Court should be reviewed in the Court of Appeals, in order that justice may be done; and that where that Court refuses to consider the alleged mistakes and errors of the nisi prius Court, or to review the cause on the merits, upon the assumption that it has not the power so to do, this Court should examine the case and preserve to the respective litigants their rights, whatever they may be; and (2) because of the refusal of the Court of Appeals to review purely questions of law, properly presented to it as shown by the record, on the plea that where a cause is tried to the Court without a jury, the Appellate Court cannot so review the questions presented, because the trial Court saw fit to determine the questions as presented as questions of fact, rather than as questions of law.

As an aid in the discussion of those questions, other questions presented by the record should be fully discussed. To that end it is contended by the petitioner (1) that upon those findings (assuming that they are conclusive upon this Court) a judgment for the plaintiff below could not be predicated. That the findings themselves show that the petitioner is entitled to a judgment.

It is also contended (2) that material findings of the trial court are mere conclusions of law by which the trial court held that the certain letters and cablegrams introduced in evidence constituted and effected a repurchase by the Trust Company of the John R. Gordon note from the Investor's Company, and a revesting of the title and ownership in the Trust Company to the said note.

The petitioner will further contend (3) that by virtue of the motion made by the petitioner, defendant below, for a judgment upon the evidence at the close of the evidence and by the rulings asked of the trial court, the petitioner was entitled of right to a review by the Court of Appeals of the evidence, to determine whether the letters and cablegrams did constitute in law a repurchase of the note, they being the sole evidence of such repurchase.

It will be further contended (4) that the two mortgage clauses attached to the policy, when properly construed, in connection with the policy itself, so affect the contract as to make the interest of the Trust Company in the insurance that of a mere payee; and (5) that in view of the condition of the record, the Court of Appeals should have investigated and determined whether the conditions of the policy and contract of insurance as to the ascertainment of the amount of loss, the furnishing of proofs of loss, and the time within which suit should be brought, have been complied with; and (6) that under a proper construction of the mortgage clause the judgment should have been for the defendant company, even though the findings are allowed to stand; and (7) that the Trust Company did not have at the time of the issuance of the policy an insurable interest in the property destroyed by fire, and did not have such an interest as the insurance contract called for.

I.

THE MORTGAGE CLAUSE IS NOT A CONTRACT OF INSURANCE INDEPENDENT OF THE POLICY. THE INSURANCE IS BASED UPON GORDON'S INTEREST.

Both the nisi prius Court and the Court of Appeals were asked to construe the mortgage clause attached to the policy; the contention being that under a proper construction of it, notwithstanding the findings of the trial Court, the Court of Appeals should have rendered judgment for the defendant company, because an independent contract of insurance was not thus effected in favor of the Trust Company, and that Gordon's sale of the property on July 3, 1893, avoided the entire contract of insurance.

This case involves, accordingly, a determination and definition of the purpose, scope and legal effect of what is known and designated in current underwriting as "the mortgage clause." It is of much concern and manifest importance to underwriters generally, as well as to the insuring public, that it should be clearly determined whether or not this so-called mortgage clause is to be interpreted and treated as a species of collateral security, or whether it is to be regarded as an independent and direct insurance of the person named in the mortgage clause.

As indicated in the petition for this writ, the use of this mortgage clause in the business of fire insurance has become widespread, and the mortgage clause has come to be used in underwriting so extensively as would seem to render the questions thus presented of such gravity and importance as to warrant the consideration of this Court.

Not only are the questions presented of general interest, but they present an aspect of the fire insurance contract which is novel to this Court. An authoritative declaration, therefore, from this Court, of the legal effect of the mortgage clause attached to a policy of fire insurance will be of great utility and value in the business of fire underwriting, and tend to establish a uniformity in the decisions in reference thereto.

The plaintiff in error, the petitioner herein, contends on the one hand that the mortgage clause is a form of collateral security, which presupposes in the first instance and depends upon the interest in the property of the person named as the insured in the policy; that that interest affords the basis for the insurance; that notwithstanding the exemptions contained in the mortgage clause, the insurance is primarily that of the mortgagor or owner of the property, and as such is set over or assigned, as collateral security, to the designated mortgagee or trustee, or *cestui que trust*, as the case may be; that the "owner of the policy," at whose request by the language of this mortgage clause itself, the insurance is made payable in case of loss to the *cestui que trust*,

is the person named in the policy as the assured (in this instance, John R. Gordon), and that all rights, primary and derivative, to the benefit of the insurance flow in the first instance through him; that the mortgagor continues to be the insured and the owner of the policy, to whom the insurance will revert on payment of the mortgage debt; that what-
vert on payment of the mortgage debt.

The defendant in error contends, on the other hand, that the mortgage clause attached to the policy is designed to be an insurance directly upon the interest of the mortgagee, trustee, or *cestui que trust*, to whomsoever the insurance is made payable, and that it requires for its support no interest whatever in the assured named in the policy. This latter view is adopted by the Court of Appeals, and we submit that it is a mistaken view and a misapprehension of the purpose, scope and legal effect of the instrument in question; that it is based upon scant and doubtful authority, while the better authority and reason of the case sustain the views of the appellee, the petitioner.

No question is presented here as to whether the interest of a mortgagee or trustee or of a *cestui que trust* may not be made the subject of insurance. It goes without saying that such might be, if the insurer saw fit to insure any one of those interests, as such. But where the insurer has not seen fit to do that, a *cestui que trust* cannot, merely because of the nature of his interest in the property, claim the benefit of the insurance.

That a mortgagee, as such, has no right to insurance effected by the mortgagor, is well established by all the authorities.

As stated by this Court in Carpenter vs. Providence Washington Insurance Co., 16 Peters, 495, quoting from Columbian Insurance Co. vs. Lawrence, 10 Peters, 512: "We know of no principle of law or equity by which a mortgagee has a right to claim the benefit of a policy underwritten for the mortgagor on the mortgaged premises in case of a loss by fire. It is not attached or an incident to his mortgage; it is strictly a personal contract for the benefit of the mortgagor to which the mortgagee has no more title than any other creditor."

No more can the *cestui que trust* claim, by virtue of his own collateral interest in the property, any contractual right as against the insurer under the insurance of the mortgagor. If the mortgagee is designated as payee under the policy, his right as an appointee to receive the insurance money emanates from the contractual rights of the mortgagor arising out of the contract of the latter with the insuring company. And it follows that whatever additional rights he may acquire by virtue of a mortgage clause are "tacked on" to the original contract between the mortgagor and insurer. They do not supplant or destroy the original contract, but give to the payee additional rights and immunities with respect to that contract.

These rights under the mortgage clause are considerable. They afford an enlarged security; they go to amplify, favorably to the appointee, that portion of the clause which merely declares that the loss shall be payable to the appointee named. But the clause, with all of its provisions, still remains far enough removed from an absolute assignment of the policy, such as would go with the assignment of the property itself, and which, if consented to by the insurer, would constitute a new insurance immediately thenceforth upon the interest of the assignee.

We proceed accordingly to locate the mortgage clause as occupying a distinctly middle ground between a naked appointment of a designated person to receive the insurance fund in case of loss, and an absolute assignment of the insurance contract; partaking to some extent of the nature of both of these, it is nevertheless neither the one nor the other.

This leads to the consideration of the subject of the assignment of policies of fire insurance, a subject which has been extensively treated in the authorities. An assignment of a policy of insurance, as collateral security, simply by making the insurance payable to the mortgagee or trustee or *cestui que trust*, without any terms, conditions or exemptions, constitutes the payee named a mere appointee to receive the insurance money in case of loss; but the insurance remains subject to and forfeitable by any of the acts of the mortgagor which are forbidden by the terms of the insurance. This is so well established as to hardly need the citation of authorities.

Bates vs. Equitable Ins. Co., 10 Wall., 33.
Carpenter vs. Providence-Washington Ins. Co., 16 Pet., 495.
Fogg vs. Middlesex Ins. Co., 10 Cush., 337.
Grosvenor vs. Atlantic Ins. Co., 17 N. Y., 391, 394.
Continental Ins. Co. vs. Hulman, 92 Ill., 145.

An absolute assignment of the policy on the other hand, coupled with a transfer of the property and consented to by the insurer, is the complete divesting of the interest in the insurance of the party originally insured. It constitutes a complete novation and substitution of the parties.

As further preliminary, however, to a consideration of the mortgage clause, as such, and for a more complete understanding of the nature of that clause and the rights created by it, we proceed to consider the subject of the assignment of a policy for purposes of collateral security as it has been treated by the authorities.

The ordinary form in which the benefit of fire insurance was made available to mortgagees and creditors, prior to the introduction of the mortgage clause now in current use, was to endorse upon the policy the words "payable in case of loss to John Doe, mortgagee," or "loss, if any, payable to John Doe as his interest may appear," the policy being issued to and in the name of the owner of the property. This form of security received great attention from the courts, and the rights created thereby are very well defined in the authorities.

In the case of Bates vs. The Equitable Insurance Co., 10 Wallace, 33, the policy was issued originally to one Philbrick. Philbrick sold the property to Bates. The policy was endorsed as follows: "Payable in case of loss to E. C. Bates," and consent to that endorsement was given in writing by the Secretary.

In passing upon the legal effect of the endorsement this Court said: "Now, it is a well-known and frequent thing in the insurance business for a person to insure his life or his property, and either in the policy itself or by endorsement at the time it is made, or by subsequent endorsement to which the consent of the company is generally required, to direct the loss to be paid to some third party, and this is done in language similar to if not identical with that used in this case. It is a mode of appointing that the loss of the party insured shall be paid by the company to such third person. This transaction is a very common mode of furnishing a species of security by a debtor to his creditor, who may be willing to trust to the debtor's honesty, his skill and success in trade, but who requires indemnity against such accidents as loss by fire or the perils of navigation. The property of the debtor at risk being thus insured for the benefit of the creditor gives him this indemnity.

"In the face of this frequent use of the two endorsements on the policy, it cannot be held that they imply themselves a knowledge of the *sale*, or *a consent to insure the purchaser* * * *. We can see in these endorsements nothing more than the direction of Philbrick, and the consent of the company, that any loss sustained by Philbrick covered by that policy should be paid to Bates. As Philbrick did not have any interest in the goods when the fire occurred, he sustained no loss, and the policy covered none."

In Carpenter vs. Providence Washington Insurance Co., 16 Peters, 495, this Court again says: "If, then, a mortgagor procures a policy on the property against fire and he afterwards assigns the policy to the mortgagee with the consent of the underwriters (if that is required by the contract to give it validity), as collateral security, that assignment operates wholly as an equitable transfer of the policy so as to enable the mortgagee to recover the amount due in case of loss; but it does not displace the interest of the mortgagor in the premises insured. On the contrary, the insurance is still his insurance, and on his property, and for his account. And so essential is this, that if the mortgagor should transfer the property to a third person without the consent of the underwriters, so as to divest all of his interest therein, and then a loss should occur, no recovery can be had therefor against the underwriters, because the assured has ceased to have any interest therein, and the purchaser has no right or interest in the policy." And again, further on, the Court says: "It is clear, both upon principle and authority, that an assignment of a policy by the insured only covers such interest in the premises as he may have at the time of the insurance and at the time of the loss. It is the property of the insured, and his alone, that is designed to be covered; and when he parts with his title to the property, he can sustain no future loss or damage by fire; but the loss, if any, must be that of his grantee. The rights of the assignee cannot be more extensive under the policy than the rights of the assignor. And as the grantee of the property, he can take nothing by the grant in the policy, since it is not in any just or legal sense attached to the property or any interest therein."

And again, page —, the Court says: "An insurance of a mortgagor and one of a mortgagee involve very different considerations, responsibilities, rights and duties, and the company might well be willing to make an insurance upon the property on account of the mortgagors, and they might be unwilling to make any on account of the mortgagee. And it is clear upon principle, that no policy can or ought to be deemed a policy exclusively on the interest of the mortgagee, unless the company have notice that it is so designed, and they assent to it. A mortgage interest is without doubt an insurable interest; but then it is a special interest, and should be made known to the underwriters."

And again, page —: "The language of Lord King and Lord Hardwicke, and of this Court in the cases already cited, show conclusively that policies of this sort are not in their nature incidents to the property insured, but that they are mere special agreements with the persons insuring, against such loss or damage as they may sustain, and not the loss or damage that any other person having an interest as grantee or mortgagee or creditor or otherwise, may sustain by reason of a subsequent destruction thereof by fire."

In the case of Fogg vs. Middlesex Mutual Fire Insurance Co., 10 Cushing, 337 (Mass.), the Supreme Judicial Court of Massachusetts, by Shaw, C. J., speaking of the different modes of assignment and their effect, says, page —: "But there is another species of assignment or transfer, it may be called, in the nature of an assignment of a chose in action. It is this: 'In case of loss, pay the amount to A. B.' It is a contingent order or assignment of the money, should the event happen upon which money will become due on the contract. If the insurer assents to it, and the event happens, such assignee may maintain an action in his own name, because, upon notice of the assignment, the insurer has agreed to pay the assignee instead of the assignor; but the original contract remains. The assignment and assent to it form *a new and derivative contract* out of the original. But the contract remains as a contract of guaranty to the original insured; he must have an insurable interest in the property, and the property must be his at the time of the loss. The assignee has no insurable interest *prima facie* in the property burned, and does not recover as the party insured, but as the assignee of the party who has an insurable interest, and a right to recover, which right he has transferred to the assignee with the consent of the insurers."

In the case of Grosvenor vs. Atlantic Insurance Co., 17 New York, 391, in which the policy provided that in case of loss such loss should be payable to the plaintiff, the Court, in passing upon the legal effect of this provision, by Harris, J., said: "I agree with the Court below, that there is nothing in the language of the policy on which the Court can adjudge that in legal effect it is a contract insuring the interest of the mortgagee as such, except in the provision which declares that the loss, if any, which occurs under the contract insuring the mortgagor's interest shall be payable to the mortgagee. That provision merely designates a person to whom such loss is to be paid, and shows that he is a person who may have an interest in its being so paid.

"The undertaking to pay the plaintiff was an undertaking collateral to and dependent upon the principal undertaking to insure the mortgagor. The effect of it was, that the defendants agreed that whenever any money should become due to the mortgagor upon the contract of insurance, they would instead of paying it to the mortgagor himself, pay it to the plaintiff. The mortgagor must sustain a loss for which the insurers were liable before the party appointed to receive the money would have a right to claim it. It is the damage sustained by the party insured, and not by the party appointed to receive payment, that is recoverable from the insurer * * * There is no just ground for discrimination between this case and that of an assignment of the policy to a mortgagee to be held by him as collateral security for his debt, with the consent of the insurer. In either case the insurance is upon the interest of the mortgagor, the terms and conditions upon which idemnity may be claimed are agreed upon, and then the original parties further agree that when by the terms and conditions of the contract the insurer shall become liable by reason of a loss sustained by the party insured, the money shall be paid, not to the party who has sustained the loss, but to his appointee or assignee for his benefit. Such an appointment or assignment ought not to be construed so as to vary in any respect the liabilities of the insurers upon their original contract."

In the case of Continental Insurance Co. vs. Hulman & Cox, a case in which the Honorable Chief Justice of this Court was counsel, the endorsement upon the policy was: "Loss, if any, payable to Messrs. Hulman & Cox, of Terre Haute, Indiana, Mortgagees, as interest may appear." And the Court, by Mr. Justice Sheldon, said, page 154: "Making the loss, if any, payable to Hulman & Cox, Mortgagees, was not an insurance of their mortgage interest in the property. As said in Flanders on Fire Insurance, page 441: 'It is merely a designation of the person to whom it is to be paid, and is not an assignment of the policy. Hence, it is the damage sustained by the party insured and not by the party appointed to receive payment that is recoverable from the insurers. The insurance being upon the interest of the insured, if he parts with that interest before the fire, no loss is sustained by him, and of course none is recoverable by his assignee or appointee. In other words, a policy made payable to A in case of loss is an agreement on the part of the insurers that A shall recover whatever the person originally insured may be entitled to recover in case of loss; that is, it is a contingent order or assignment of what may become due under the contract; and is not an absolute transfer by virtue of which the assignee acquires the full rights of an assignee of a chose in action.'"

Many other cases may be cited to the effect that a policy of insurance issued to a mortgagor of real estate, and made payable to the mortgagee in case of loss, is an insurance of the interest of the mortgagor in the estate and not of the interest of the mortgagee.

Baldwin vs. Phoenix Ins. Co., 60 N. H., 16.

Macomber vs. Cambridge Mut. Fire Ins. Co., 8 Cush., Mass., 135.

State Ins. Co. vs. Maackens, 9 Vroom., N. J., page 564.

This being established and the nature of an absolute assignment being also understood, what is to gage clause, which contains in addition to the loss be said with regard to the construction of the mort- payable clause the exemptions and conditions therein set out?

The view of the petitioner, the plaintiff in error in this case, is that the mortgage clause before us is but a modification of the loss payable clause. While it is amplified in favor of the payee and provides certain exemptions from the acts or neglect of the mortgagor, the insurance, nevertheless, is predicated upon the interest of the mortgagor, the insured named in the policy. From this source, if at all, the insurance takes validity in the first instance. While, from and after the time at which the mortgage clause takes effect, the interest of the mortgagee or trustee or *cestui que trust*, as the case may be, is not to be affected by the acts or neglect of the insured, and while the mortgage clause does contain an agreement between the insurance company and the payee, *in addition to that contained in the policy itself*, the contract under the mortgage clause is made with respect to the interest of the payee in the insurance which has been effected upon the interest of the insured in the property, and is not an insurance upon the interest, as such, of the payee in the property. The mortgage clause, while it contains in one sense an independent agreement, is not an independent or new contract of insurance; it is by no means identical with a policy of insurance issued directly to the mortgagee upon the mortgagee's interest in the property.

Taken by itself the mortgage clause would be an unintelligible instrument; taken with the policy, and still an undertaking is presented anomalous to the general law of contracts. But it is not possible to class such a contract with policies issued directly to a mortgagee, or with insurances upon the mortgagee's interest as such.

The case of Hastings vs. Westchester Irs. Co., 73 N. Y., 141, is the case relied upon by the Court of Appeals, and furnishes the supposed precedent for the case of Syndicate Ins. Co. vs. Bohn, (also decided by the Circuit Court of Appeals of this, the Eighth, Circuit), which in turn is the precedent taken for the case at bar.

The Hastings case is repeatedly referred to in the Bohn case as holding that by the contract relation created between the insurer and the payee under the mortgage clause, the mortgage agreement is a distinct and independent contract of insurance.

But in the case of Meriden Savings Bank vs. Home Mut. Ins. Co., 50 Conn., 396, the general nature of the agreement is differently stated. There was an agreement made between the bank and the insurance company, for a consideration, whereby it was provided in respect to policies of the defendant company which the bank might hold payable to it as collateral security, that no act of the owner under any policy should invalidate the insurance as to the bank.

The Court, referring to the Hastings case, says: go quite so far as that seems to go, and hold that the mortgage agreement is a distinct and independent contract of insurance. It is rather an agreement relating to an existing policy by which certain conditions are dispensed with and certain privileges are secured to the insurers which they would not otherwise have, and the plaintiffs are made a party to the contract of insurance."

In the case of Doran vs. Franklin Fire Insurance Co., New York Court of Appeals, as reported in the 10th Ins. L. J., at page 843 (not fully reported in New York Reports), the Court, by Folger, C. J., speaking of the policy and mortgage clause, says: "The policy is an insurance of the owners and mortgagor's interest, loss if any, payable to the mortgagee. But there is an agreement by the insurer that if any act or omission of the owner takes place by which any condition of the policy is broken, and the policy voided by him, the insurer will not take advantage of that against the mortgagee; but will pay him the loss, reserving the right to the insurer that if it claims that there was such act or omission (which must mean that if it rightly so claims), it shall be subrogated to the rights of the mortgagee. *This is different from an insurance of the mortgage interest.* It is an insurance of the owner's interest, and the policy enures to his benefit at the outset, and so continues, unless some condition in it is broken."

Also, see the case of Davis vs. Ins Co., 135 Mass., 251.

The proposition that the mortgage clause contains an independent contract with the party therein designated, need not be disputed; nor is that proposition inconsistent with the position here taken. It does not follow therefrom that the mortgage clause is an insurance of the payee thereunder or an insurance upon his interest in the property. The new and independent contract is an agreement made with respect to the already existing contract or policy of insurance. It does not agree that that existing policy is a valid one, nor does it substitute the payee for the insured, nor change the insurance from one upon the interest of the insured in the property to an original contract of insurance upon the interest of the payee.

The distinction between an interest in the insurance contract, which the payee acquires, and the interest in the property upon which the insurance is predicated must be manifest.

Smith vs. Saratoga Mut. Ins. Co., 3 Hill, 508.

The "interest of the trustee" contemplated by the mortgage clause has reference to his interest in the insurance, and not to his insurable interest in the property. This is clear not only on principle, but results as well from the express language of the mortgage clause. The clause reads: "This *insurance*, as to the interest of the mortgagee or trustee *therein* only, shall not be invalidated, etc."

The interest referred to, the right of the payee to receive payment of the insurance in case of loss, is an acquired or derivative right growing out of the contract with the original insured, and is not in itself an original contract of insurance.

Meriden Savings Bank vs. Home Mut. Ins. Co., 50 Conn., 396.

Davis vs. German-American Ins. Co., 135 Mass., 251.

Not only are we led to the conclusions thus reached from the authorities which have been presented, but we find that the mortgage clause occupies a distinct place in the history and development of the business of fire underwriting, and of the law governing the subject. That it is designed to meet a necessity of the business, for an understanding of which we are required to go back to the early history of insurance law. By so doing we find the practical reason by which to account for the existence of this peculiar form of contract.

A mere glance at this sort of a contract, which may be called an anomaly to the law of contracts, suggests immediately the question, why does such a contract exist for the purpose of securing the benefit of fire insurance to mortgagees or the holders of collateral securities, when it is manifest that an insurance directly to the mortgagee upon his interest as such would be a simple and valid undertaking? In response to that question we say that the principle of indemnity, the wholesome principle which lies at the foundation of fire underwriting, has rendered it inevitable that this form of contract should exist, and that fire underwriters should in general furnish insurance for the benefit of collateral interests, only in the form of a secondary or derivative contract, resting primarily upon the interest of the owner of the property.

Throughout the whole history of fire underwritnig it has been a perplexing problem to restrict the amount of insurance recoverable upon the property to the actual value of the property. Over-insurances and double insurances are the source of the greatest evils and dangers known to the business of fire underwriting. It is through these means that losses by fire may be readily made the subject of speculation and gain and fraud. To restrict, therefore, by every possible means, the amount of the insurance carried upon property to the amount of its actual value has ever been the aim of underwriters, and in this they are sustained by a wise public policy.

Now, by an early decision of Lord Mansfield, the door was thrown open (unwittingly be it said, with respect to the memory of that learned man) to the perpetration of fraud by means of double insurances.

In the case of Godin et al. vs. London Assur. Corporation, 1 Burr, 498; 1 Bl. Rep., 103, Lord Mansfield decided that where different parties with different interests in the same property took out separate insurances, these insurances would not be contributory to each other, and each party might recover to the full value of the property within the limit of his insurance. This was a departure from the rules previously laid down, both in England and upon the Continent, whereby in the case of double insurances it was established that there should be but one satisfaction for the loss, to which the various underwriters in interest should contribute.

Under this decision of Lord Mansfield it became possible for any number of persons with different interests to insure property to its full value; as any lien might of itself exceed the whole value of the property, and thus many times the value of the property would be recovered in case of its destruction.

The decision of Lord Mansfield was followed in many cases, and is the law to-day. In fire insurance it came to be applied to cases involving the interests of mortgagor and mortgagee, and in many cases it has been held, and it is the law to-day, that insurance issued directly to a mortgagor and insurances issued directly to a mortgagee or to any number of mortgagees, are neither contributory to each other, nor does the one invalidate the other under the provisions of policies forbidding the taking of other insurance.

Among the cases upon this subject are:

Tyler vs. Aetna Ins. Co., 12 Wendell, 507.

Fox vs. Phoenix Ins. Co., 52 Me., 333.

Mut. Safety Ins. Co. vs. Hone, 2d Coms., 235.

See 2 May on Ins., section 365.

This line of decisions, adding manifestly to the insurance risk by increasing the opportunities for double insurances, and hence the moral hazard of the insurance, led underwriters by a general consent, to practically cease to insure mortgagee interests as such. The "loss payable clause" was accordingly introduced into fire underwriting, and became the common form of collateral security; so that insurances ran to the mortgagor or owner of the property with the clause, "Loss, if any, payable to John Doe, mortgagee, as his interest may appear."

As we have heretofore shown, this loss payable clause received great attention from the Courts, and it has been uniformly held that the insurance thereunder is an insurance of the mortgagor upon his interest in the property, the mortgagee being thereby made merely an appointee to receive such sum as might otherwise become payable to the mortgagor.

The purpose of this clause and the practice under it will be readily understood to be the restricting of the insurance to a single insurable interest, and thus to limit the recovery in case of loss, to a single indemnity, measured by the value of the property. When taken in connection with other clauses in the policy, such as that providing that the interest of the insured shall be the unconditional and sole ownership, it is designed that the amount of insurance recoverable shall be restricted to an amount equal to the value of the interest of an owner of the entire property, and that no more than once the value of that interest should be recovered.

But, pursuing the subject further, the fact that the Courts uniformly held that this form of insurance would not protect the mortgagee against the subsequent acts of the mortgagor, in violation of the terms of the policy, led to a demand on the part of the holders of collateral interests for a more liberal contract in their favor. To this demand the underwriters cautiously yielded. But the present mortgage clause did not spring at once, full fledged, into existence. It is apparently the result of successive additions to the ordinary loss payable clause.

Thus in the case of City Five Cents Savings Bank vs. Pennsylvania Fire Ins. Co., 122 Mass., 165, the loss being payable to the mortgagee, the policy contained the special provision merely, that "No sale or transfer of the property hereby insured shall vitiate the right of the mortgagee to recover in case of loss," and there are other cases of endorsement which do not contain all of the features of the Union Mortgage Clause.

But what is specially to be observed in this connection is, that while yielding to the demands of mortgagees for a more liberal form of endorsement, the underwriters did not abolish the loss payable clause, nor return to the plan of issuing insurances directly to mortgagees upon their interests as such, as might have been done had the underwriters been willing to sacrifice the principles of indemnity or to assume the additional risks attendant upon the practice of separately insuring diverse interests in the same property.

Such being, in brief, the history of this form of agreement and the reason which underlies it, it can be readily seen why from the standpoint of practical underwriting the form of insurance now under consideration must be treated as primarily and essentially an insurance of the interest of the owner of the property and not an insurance of the interest of the mortgagee as such. Any other theory is subversive of fundamental principles of underwriting, and destructive entirely of the protection intended to be maintained against unlimited insurances upon limited values.

The foundation, then, of the contract of insurance was Gordon's interest in the property. If Gordon's interest really supported the insurance, of course the insurance ceased when he sold the property, and if the insurance of the Trust Company was dependent upon Gordon's interest, it also ceased; and, hence, the Trust Company takes the position that by reason of the attachment of the mortgage clause, it has an independent and direct contract with the insurance company. The policy and the mortgage clause must be construed together, else there would be no contract at all. The mortgage clause was made simultaneously with the policy. The policy must have had some force. It must have served some purpose. It in express terms refers to the mortgage clause, and the mortgage clause expressly refers to the policy. It must be looked to to ascertain the status of parties under the mortgage clause, and from the two learn the terms of contract.

A paper purporting to be conditions of insurance, if annexed to and delivered with the fire policy, is to be deemed *prima facie* a part of it, although the policy does not contain an express reference to such paper.

Murdock vs. Ins. Co., 2 N. Y., 210.

But in this case the policy did refer to the clause. The policy itself provides that where clauses are attached, the terms and conditions of the policy are affected in accordance with the conditions of the attachment.

"If, with the consent of this comapny, an interest under this policy shall exist in favor of a mortgagee or of any person or corporation having an interest in the subject of insurance, other than the interest of the insured as described herein, the conditions hereinbefore contained shall apply in the manner expressed in such provisions and conditions of insurance relating to such interest as shall be written upon, attached or appended hereto."

The mortgage clause is as follows:

"Whereas, the property described in this policy has been conveyed to M. D. Thatcher, in trust, to secure the payment of a certain indebtedness to The International Trust Company, Denver, Colorado.

"And whereas, the owner of the policy has requested that the loss, if any, be made payable to the said company: Therefore, the loss, if any, is made payable to The International Trust Company, Denver, Colorado, and its assigns.

"It being hereby understood and agreed, that this insurance, as to the interest of the mortgagee or trustee only therein, shall not be invalidated by any act or neglect of the mortgagor or owner of the property insured, nor by the occupation of the premises for purposes more hazardous than are permitted by the terms of this policy; Provided, that in case the mortgagor or owner neglects or refuses to pay any premium due under this policy, then on demand, the mortgagee or trustee shall pay the same; Provided, also, that the mortgagee or trustee shall notify this company of any change of ownership or increase of hazard which shall come to his or their knowledge, and shall have permission for such change of ownership or increase of hazard duly endorsed on this policy. And provided, further, that every increase of hazard not permitted by the policy to the mortgagor or owner shall be paid by the mortgagee or trustee on reasonable demand, and after demand made by this company upon, and refusal by the mortgagor or owner to pay, according to the established schedule of rates. It is, however, understood that this company reserves the right to cancel this policy, as stipulated in the printed conditions of said policy; and, also, to cancel this agreement, on giving ten days' notice of its intention to the trustee or mortgagee named therein, and from and after the expiration of the said ten days this agreement shall be null and void. It is further agreed, that in case of any other insurance upon the property hereby insured, then this company shall not be liable, under this policy, for a greater portion of any loss sustained than the sum hereby insured bears to the whole amount of insurance on said property, issued to or held by any party or parties having an insurable interest therein. It is also agreed that whenever this company shall pay the mortgagee or trustee any sum for loss under this policy, and shall claim that as to the mortgagor or owner no liability therefor exists, it shall at once and to the extent of such payment be legally subrogated to all the rights of the party to whom such payment shall be made, under any and all securities held by such party for the payment of said debt. But such subrogation shall be in subordination to the claim of said party for the balance of the debt so secured. Or said company may, at its option, pay the said mortgagee or trustee the whole debt so secured, with all the interest which may have accrued thereon to the date of such payment, and shall thereupon receive from the party to whom such payment shall be made an assignment and transfer of said debt, with all securities held by said parties for the payment thereof.

"In testimony that the foregoing provisions are made a part of policy No. 4475189, of Sun Ins. Office of London, to which they are attached, witness my hand at Pueblo, Colo., this 14th day of June, A. D. 1893.

"HENRY O. MORRIS, Agent.

"Accepted and agreed to by

"THE INTERNATIONAL TRUST
"COMPANY,

"By Henry W. Hobson, Vice-Pres't."

The security is in the form of a trust deed; not a mortgage. The loss is not payable to the Trustee under the trust deed, but to the original payee of the note. Mahlon D. Thatcher is the Trustee, but the loss is payable to the Trust Company. Hence we must consider the distinction between the three distinct interests, namely, the interest of the owner in the property, the interest of the Trustee, and the interest of the Trust Company. The interest of the mortgagee or trustee only shall not be invalidated by the act or neglect of the mortgagor. There is no such provision as to the payee, the Trust Company. No reference is made to the interest of the Trust Company in the body of the mortgage clause, nor how it may be affected by the acts of the owner.

It is apparent, therefore, that the Trust Company can only recover upon a condition of facts entitling Gordon to recover, and notwithstanding the findings of the Court that the Trust Company had an interest in this property at the time of the issuance of the policy, nevertheless, a recovery cannot be had because of the act of Gordon in disposing of the property, and the judgment should have been for the defendant. There is thus presented a pure question of law, and the Court of Appeals should have decided it as such.

II.

The Mortgage Clause in suit did not provide that the insurance, as to the interest of the Trust Company should not be invalidated by acts of the mortgagor, o, owner.

There is another reason why *The International Trust Company* cannot recover under this mortgage clause, by virtue merely of its interest in the securities. This reason grows out of peculiar provisions of the mortgage clause before us. A contract of this kind is a special bargain to be construed according to its terms and not to be enlarged by implication or extrinsic facts. In one important and remarkable aspect this mortgage clause differs from the ordinary standard mortgage clause, and from that found in the Bohn case. In the present instance, the form of security used is a trust deed and not a mortgage. The trustee under the trust deed is one Mahlon D. Thatcher. But the mortgage clause, instead of making the loss payable to Mahlon D. Thatcher, the Trustee, *makes it payable to The International Trust Company.*

Now, the recitals at the beginning of the mortgage clause go to distinguish it from similar clauses which have been before the Courts. The language used is as follows:

"Whereas, The property described in this policy has been conveyed to Mahlon D. Thatcher, in trust, to secure the payment of a certain indebtedness to The International Trust Company, of Denver, Colorado;

"And whereas, The owner of the policy has requested that the loss, if any, be made payable *to the said company;* therefore, the loss, if any, is made pay- Colorado, and its assigns." But the instrument then goes on in the ordinary language of the mortgage clause, and provides that "This insurance, as to the interest of the mortgagee, *or trustee, only,* therein, shall not be invalidated by any act or neglect of the clause does not make reference to the interest of the mortgagor or owner of the property insured." The Trust Company, nor provide that the insurance shall not be invalidated as to the interest of The International Trust Company by the act of the mortgagor. So that, even assuming that the protection of the ordinary mortgage clause may be extended to apply to a case where the person insured has no interest in the property, it cannot be said that under the language of this clause The International Trust Company can avail itself of that protection.

If the interest *of the trustee only* in the insurance is not to be invalidated by acts of the owner of the property, then the interest of The International Trust Company is not included in the terms of this contract. Whatever the party who drew this instrument may have intended to accomplish, it is certain that it falls short of containing an exemption of The International Trust Company from the acts or neglect of Gordon. To make such a meaning evident, would require language which the parties have not used, and to enable the Court to give such a construction to the contract would require a reformation of the instrument, which is not called for in this action. If the Trust Company desired to secure enlarged and special benefits to itself, to be carved out of this insurance, it should have bargained for and secured a contract in language adequate to express its desires and intentions in this behalf. If it has failed to do so, it is not the duty of the Court to make over the contract, or to reform the language used, particularly when no request has been made to that end. As the contract reads, it is in reality to be construed as to The International Trust Company as the ordinary loss payable clause has always been construed, and as if no provision of exemption in any event existed.

The two words, "mortgagee" and "trustee," used in this clause, are evidently incorporated into it, following the well known formula of the Union mortgage clause, which is printed and distributed by underwriters for use over a large territory, covering different States in which a variety of forms of real estate security are used—in some States mortgages, and in others trust deeds—the form being prepared with reference to use in a variety of cases, the one word, "mortgagee," or the other, "trustee," being superfluous according to whether a trust deed is used or a mortgage.

In case of a trust deed, it will be apparent that the interest of the *cestui que trust* and that of the trustee—in other words, in this case, the interest of The International Trust Company and that of Mahlon D. Thatcher, afford very different subjects matter for insurance.

In a case of this kind, where interests in property subject to trust deed are involved, there are three distinct insurable interests, upon any one of which, as a basic interest, the insurance might be predicated by a proper understanding and agreement of the parties and designation of the interest to be covered. Very different legal and practical results would flow and different relations would be created between the several parties, according to the interest insured. Thus, the insurance could be written upon the interest of the owner of the property, or it could be written directly to the Trustee, or, again, directly to the *cestui que trust*. Again, it might be issued to the owner of the property with loss payable to the Trustee; or, with loss payable to the *cestui que trust*. The consequences of making the loss payable to the Trustee differ materially from those where it is made payable to the *cestui que trust*, the owner or holder of the note or notes which the trust deed is given to secure. Thus, if the loss be made payable to the Trustee, he holds the money, in case of loss, for all parties—both the owner of the property and the owner of the note—or notes, if there be more than one—whoever the owners of the notes may be, and whatever transfers may have been made of the securities.

If the owner of the property be not in default upon the note, the Trustee cannot pay over the funds in his hands to the owner of the note, but must hold the money as trustee for all parties and be accountable therefor to all.

Fergus vs. Wilmarth, 117 Ill., 542.

In case there should be no liability to the in-
breach of the policy conditions, it would seem that
sured, the owner of the property, by reason of the

the Trustee would by virtue of the subrogation clause of the mortgage clause be trustee for the insurer and the owner of the note.

Frequently the payment of the insurance money to a Trustee will be undesirable to the note holder, as for instance, in the case of a Public Trustee. The coming into possession of the insurance money immediately without the intervention of the Trustee, would be a desirable thing in many instances to the owner of the note, and it may be surmised that it was for such reason that The International Trust Company would desire the loss paid directly to it. But different legal consequences necessarily result in the two cases. And it cannot be contended that the Trust Company and Thatcher, the Trustee, occupy identical relations. The exemption of Thatcher, the Trustee, is not necessarily an exemption of the Trust Company from the acts of the party insured. The International Trust Company is not the Trustee under this contract, and the Trustee is alone declared to be exempt from the acts of the assured.

As to his interest in the property, the Trustee is the trustee of the legal title. Insurance, if it were made directly to him, would attach by virtue of his legal title to the property and his trust relations thereto. But where a particular owner of a note is designated as the payee, not in general terms, but by expressly naming the party, as in this case, The International Trust Company, the sale or transfer of the note, *without recourse*, terminates absolutely the interest of the payee in the insurance. And the insurance does not stand for the benefit of the endorsee of the note as it would in case the loss were payable to the

Trustee. Thus it follows that as an insurance of the Trustee and an insurance of the *cestui que trust*, or particular owner of the note, are very different and distinct undertakings, a clause in the contract which speaks of the interest of the Trustee only cannot be extended by implication merely, to the interest of the holder of the note.

In the Bohn case the loss was made payable to The National Life Insurance Company, beneficiaries and assigns, and the clause went on consistently with this direction throughout, to provide that as to the interest of the "mortgagee, beneficiaries and assignees," the insurance should not be invalidated, etc.

III.

The Trust Company itself did not have such an Insurable Interest in the securities as wonld support the insurance.

We proceed now to consider the case upon the theory adopted by the Court of Appeals, viz.: That the contract is one directly with The International Trust Company, and an immediate insurance of their interest as such in the property. Here comes in for consideration the second special defense presented by the appellee, viz.: That on December 29th, 1893, the Trust Company sold without recourse the Gordon note to The Investor's Mortgage Security Company, of Edinburgh, and that on August 26th, 1893, the complainant Trust Company was not the owner of the Gordon note; that it did not have the insurable interest therein sufficient to sustain the insurance under the terms and requirements prescribed by the policy of defendant society as to interest and ownership of the subject of insurance. So that, even if the insurance contemplated by this contract was an insurance of the interest as such of The International Trust Company, in the property, no recovery could be had, because the Trust Company did not have the interest requisite to support the insurance according to its terms and conditions.

The defendant in error, the plaintiff below, claims that at the time the policy was issued, The International Trust Company was the absolute owner of the Gordon note by a repurchase made on the 12th day of June, 1893, and as such owner had the insurable interest required by the terms of the insurance contract at the time that contract is alleged to have been made, and that the insurance attached directly upon that interest. The Court of Appeals sustained this contention.

But the claim of the Trust Company to the ownership of the Gordon note is based wholly upon correspondence between the Trust Company and the Investor's Company relative to the collection and to the repurchase by the Trust Company of the note. That correspondence is read into the evidence in the case by the witness, Hobson.

It is contended on behalf of the petitioner that this correspondence resulted, at most, in an engagement on the part of the Trust Company to take over the securities on the 15th of September. The Court of Appeals interpreted this correspondence as constituting a repurchase of the note on the 12th of June. The correspondence must be examined to determine whether the contention of petitioner is correct as to the effect of that correspondence, and as to whether or not it consummated a purchase of this note prior to the 14th day of June, 1893.

This branch of the case involves a consideration of the purpose and effect of the mortgage clause in another aspect entirely from that presented in the foregoing discussion. If the contention of the defendant in error, The Trust Company, should be sustained that the mortgage clause constitutes a direct and original contract of insurance of the Trust Company upon its specific interest in the property, the further question is presented as to whether the interest which the Trust Company actually had in the Gordon indebtedness at the time the insurance was issued, was such an interest as would support the contract of insurance upon which recovery is sought.

It is claimed by the petitioner that the Trust Company did not have such an interest. Herein are presented questions as to the meaning and effect of the mortgage clause which we submit are likewise of such importance and general interest as to merit an examination and review by this Court.

The majority of the Court of Appeals held that that Court was concluded in this case from a consideration of the question here presented, viz.: Whether the correspondence referred to constituted and effected a repurchase of the Gordon note by the Trust Company; because the trial court made a finding that "The Trust Company did on the 12th day of June, 1893, reacquire title to the note of said John R. Gordon by repurchase, and did reacquire an insurable interest in and to the property covered by the policy of insurance issued by the defendant company; and the Trust Company did on the 12th day of June, 1893, actually pay to the said Investor's Security Company the sum of $1,750.00, being part of the amount due upon repurchase; and did assume the payment of the balance of the purchase price, viz.: $50,000, and did from that time on treat and dispose of said note as its own property."

Sanborn, J., dissented from this view of the majority of the Court, being of the opinion that the Appellate Court was not, under the manner and form in which the question was presented, precluded from examining this correspondence which contained the evidence relating to the insurable interest of the Trust Company and of its alleged repurchase of the note. This question we have reserved for consideration in a subsequent part of this brief, believing that of itself the question thus involved is of sufficient importance to claim the attention of this Court.

The Court will acquire a better understanding of the propositions involved under that branch of the case after some consideration of the part of the case now under review.

The majority of the Court, however, in passing upon this question, said: "But even if the special finding now under consideration was open to review by this Court, we should not be able to say that the Circuit Court erred in finding that the Trust Company had such an insurable interest as was sufficient to support the policies. In the case of The International Trust Company vs. The Norwich Union Fire Insurance Society, we have held, that the Trust Company had *an insurable interest* on June 26, 1893, by virtue of the consummated agreement with The Investor's Mortgage Security Company to take up the Gordon note, which was secured by deed of trust on the insured property. It was further shown in these cases, that on June 12, 1893, the Trust Company had advanced and paid the interest on said note, amounting to $1,750, and we think it most probable in view of the relations then existing between the Trust Company and the Mortgage Company, that the payment so made gave to the former company such an interest in the note and deed of trust as would serve to support a policy covering the mortgaged property which was taken out after that date."

In directing the consideration of the Court to the correspondence in question, it is to be noted that in another case, that of The International Trust Company, Appellant, vs. The Norwich Union Fire Insurance Society, Appellee, a suit in equity heretofore presented to this Court upon petition for writ of certiorari, the correspondence produced in evidence, varied from that introduced in the present case. In the present case we have a cablegram of June 26, 1893, from the Investor's Company to the Trust Company; a letter of the same date from the Trust Company to the Investor's Company; and a letter of June 28th from the Investor's Company to the Trust Company, which were not introduced in the equity case referred to. We accordingly would refer to the correspondence as shown by this record, pages 33 to page 43, inclusive, as set out fully in the petition for this writ.

We submit that, under the terms and provisions of the insurance contract, The International Trust Company did not on June 14, 1893, have an insurable interest of the nature and extent required and necessary to support the insurance claimed by it to have existed in its favor.

Herein is involved, as stated in our petition, the question of the nature and extent of the insurable interest acquired under an uncompleted agreement or negotiation for the purchase of collateral securities, and the extent to which an inchoate interest in a promissory note or chose in action, the nature of which interest is undisclosed and unknown to the insurer, will support an insurance which requires that the interest of the insured shall be a sole and unconditional ownership. These questions involve the consideration of the contractual relations created by the policy of insurance with mortgage clause attached, and are of importance not in this case alone, but in all cases involving the construction of contracts of this kind.

In regard to the ownership of the Gordon note and its repurchase by the Trust Company, the Court of Appeals says in its opinion: "Now, while it may be true that the legal title to the paper was not vested in the Trust Company on June 26th, 1893, or even on August 26th, 1893, in the sense of the law merchant or in such way as to cut off equities of defense, because it had not been endorsed by the Mortgage Company, nevertheless, as *the agreement of sale was complete* and *the note was in the hands of the Trust Company*, there can be no doubt that the Trust Company had a good equitable title to the paper on August 26th, 1893, such a title as would have enabled the Trust Company to maintain an action at law on the note in the Courts of Colorado, whose code provides that 'every action shall be prescribed in the name of the real party in interest.'"

Code of Procedure, chapter 1, section 3.

"A consummated agreement of sale such as is shown by the correspondence in the present case, especially where the thing sold *is in the possession of the vendee*, operates to transfer the title of the article or thing sold to the purchaser. Under these circumstances we have no doubt that the Trust Company had *an insurable interest* in the hotel property in controversy on August 26th, 1893, and the contention to the contrary is in our opinion without merit."

Now, it will be observed that the Court of Appeals proceeds upon an assumption: First, that the agreement of sale was complete; and second, that the note was in the hands of the Trust Company or "in the possession of the vendee;" and third, that "*an insurable interest* in the hotel property" was all that was necessary to support the insurance in question. But in the first place it will be disclosed by the correspondence itself between the Trust Company and the Investor's Company, that the terms of the sale were not agreed upon until September 5th, 1893. (See letter of International Trust Company to Guild & Shepherd of that date). Again, the note was *not* in the possession of the Trust Company, the note was endorsed by the Investor's Company to "John F. Bell, Trustee, for Investor's Mortgage Security Company, Limited." And as shown by letter of August 9th, 1893, it was sent by the Investor's Company to John F. Bell, so endorsed to him as Trustee, with the instruction, "Kindly acknowledge receipt of same and hold it for collection."

Finally, if it be admitted that under these circumstances the Trust Company had "an insurable interest in the hotel property in controversy on June 14, 1893," it will be observed that the petitioner in this case has not undertaken to controvert or discuss the proposition as to whether an insurable interest existed, as it has been deemed unnecessary to do so in view of the fact that *an insurable interest*, merely, would not, in any event, have been sufficient to sustain an insurance such as that claimed to have existed in this case. It was necessary, in order to support such a contract of insurance, not only that the party insured should have had "an insurable interest," but that the interest of the kind and extent expressly called for by the terms of the contract should have existed.

Upon this correspondence the question is raised as to whether in contemplation of law The International Trust Company was the owner of the Gordon note on the 14th of June, 1893, or whether, by virtue of this correspondence, the Trust Company acquired the insurable interest necessary to support, under the terms of the contract, an insurance directly upon the interest of The International Trust Company. This, in turn, involves the more general consideration of importance in connection with the interpretation and construction of the mortgage clause generally, as to how far the terms and conditions of the policy itself enter into or control the mortgage clause, or to what extent the terms and conditions of these two instruments enter into each other and how the two instruments are to be construed when taken together in order to define the obligation assumed thereunder by the insurance company. What, in other words, are the terms and conditions of the insurance as between the underwriter and the payee, with respect to the various matters upon which the mortgage clause is silent, but with respect to which the policy itself speaks? If this is an insurance directly to the Trust Company upon its interest in the property, what are the terms and conditions of that insurance?

In considering the legal effect of the correspondence in question upon the ownership of the Gordon note, it becomes necessary to consider at the threshold the question which naturally and of necessity arises in the consideration of all such contracts, viz.: What constitutes the agreement between the insurer and the payee under the mortgage clause, as to the terms and conditions upon which the insurance is predicated; and how far are the terms and conditions set out in the policy to be taken as incorporated into the agreement with the payee under the mortgage clause; and how far do they go to determine and define the contractual rights of the parties, for example, as to the nature and extent of the insurable interest required of a payee?

Our position here is, that the terms of the policy must be referred to in order to determine the rights of the parties to the mortgage clause; so that, where the policy provides that if the interest of the insured in the property be not truly stated that the policy shall be void, and that it shall be void if the interest of the insured be other than unconditional and sole ownership, those conditions are to be applied and enforced with respect to any interest which is the subject of the insurance. In other words, the mortgage clause must be subject to the conditions of the policy with regard to the nature and extent of the insurable interest required to support the insurance.

In the case of American Building and Loan Association vs. Farmers' Insurance Company, 40

Pacific, 125-127, the Supreme Court of Washington says upon this subject: "The annexation of the mortgage clause operates merely as a modification of the policy by dispensing with certain requirements, duties and obligations which by the terms of the policy were imposed upon the owner, and protects the mortgagee against his (the mortgagor's) acts, either of omission or commission; but that general provisions of the policy intended for the security and protection of the company, and which do not relate personally to the mortgagor, such as the stipulation concerning the time in which an action shall be brought are not abrogated or affected by it. The mortgage clause is not a complete contract in itself, nor does it profess to be. It is of course conclusive upon the parties in so far as it speaks, and controls any provisions of the policy to which it is attached which are inconsistent with it; but as a complete or entire contract it is indefinite and uncertain. Resort must still be had to the terms of the policy to ascertain many things which are the very life of the contract; among others, the amount of the insurance, the property insured, the term of insurance, and very many matters concerning which the endorsement itself furnishes absolutely no information whatever. The suit is based not upon the endorsement as a complete contract, but upon the policy of which it is simply a part. It is the policy which constitutes the basis of plaintiff's right to a recovery."

And so, in the case of Ormsby vs. Phoenix Insurance Co., Supreme Court of South Dakota, 24 Ins. L. J., 115, the court says: "But notwithstanding the mortgage clause constitutes a new agreement between defendant and mortgagee, there is, nevertheless, incorporated into it certain portions of the original contract of insurance with the owner or mortgagor. The property insured, the amount insured, the terms of the policy, the rate of insurance, must be determined by the original policy. In addition thereto the stipulations contained in the original policy may under certain circumstances be in force and effect."

In the case at bar, moreover, the mortgage clause expressly and formally declares that its "foregoing provisions are made a part of the policy * * * to which they are attached." And the policy also provides that its conditions shall apply to other interests than that of the insured, in the manner expressed in the provisions relating to such interest as may be attached to the policy. To determine, therefore, the nature and extent of the interest required to support a contract immediately with The International Trust Company, it is necessary to resort to all of the terms of the insurance bearing upon that subject.

The interest upon which an insurance immediately to the plaintiff below would have to be predicated would be the interest of the plaintiff in the indebtedness, or its interest in the property by reason of, and measured by, its interest in the indebtedness; that is, in the Gordon note and securities.

Carpenter vs. Providence Wash. Ins. Co., 16 Peters, 495.

This would be, perhaps, not strictly an insurance of the debt, but an insurance of the plaintiff against any impairment of the value of the debt, by loss of the property which constitutes the security for the debt; so that the interest, if any, of the Trust Company in the debt or note, constitutes its insurable interest. The interest is described "as a certain indebtedness to The International Trust Company."

The mortgage clause in this case does not run as in some cases, "as interest may appear," but specifies the interest. We would submit, therefore, that the interest of the Trust Company, in order to support an insurance directly to it, must have been the sole and unconditional ownership of the Gordon note, or indebtedness, and that this interest must have existed at the time the insurance is alleged to have been taken out. The requirements as to interest constitute warranties as to the nature and extent of the interest insured.

By endorsing the note without recourse, The International Trust Company ceased to have any responsibility or liability as endorser, and therefore parted with all of its interest when it sold the note to The Investors' Security Company, December 29th, 1892. So that unless the correspondence between the Trust Company and the Investors' Company vested in the Trust Company the sole and unconditional ownership of the Gordon note on or before the 14th day of June, 1893, the insurance, even as an insurance directly upon the interest of the Trust Company, failed.

We think the appellant admits this, and accordingly it insists that it was the absolute owner of the note.

The Court of Appeals evidently considered that the forwarding of the $1,750 interest money by the Trust Company to the agents of the Investor's Company on the 12th day of June, 1893, constituted a part payment of the purchase price for said note, and that, therefore, on the 14th day of June, 1893, the date of the issuance of the policy, the Trust Company had an insurable interest, such as would support the policy. This policy was written two days after the forwarding of the interest and two days after the first letter to the Investor's Company had been sent. If, then, anything can be said to have created this insurable interest, it must have been the payment of the $1,750; which payment the record discloses was an advancement for Gordon. What became, then, of that insurable interest when, on June 19, 1893, Gordon repaid the Trust Company the amount thereof? That insurable interest must have ceased to exist. Consequently, the basis for an insurable interest must be looked for elsewhere than to the payment of this $1,750. As we shall presently see by the correspondence, no agreement of any kind was reached as to the repurchase until long thereafter, and after the sale of the property by Gordon, on the 3d of July, 1893. Consequently, the policy issued on the 14th of June, 1883, was void, and as we shall presently see, the consummation of a repurchase of this Gordon note thereafter did not revive the policy.

In Carpenter vs. Providence Washington Insurance Company, 16 Peters, 495, this Court says:

"The authorities all hold that the party insured must have an interest at the time of the making of the policy as well as at the time of the loss; and if Reed had no interest upon which the policy would attach by its terms when the insurance was made, but acquired it afterwards, and the policy had been made upon his sole account, it would have been a mere nullity."

In Bergson vs. Builders' Insurance Company, 38

Cala., 543, the Court says: "The insured must have an interest in the property, both at the time the contract is made and when the loss happens; otherwise there can be no recovery on the policy; and upon this point all the authorities agree."

In Saddlers Company vs. Badcock, 2d Atkyns, (1st Bennett's Fire Insurance Cases, 7-9), the Court says: "I am of the opinion it is necessary that the party insured should have an interest or property at the time of the insuring, and at the time the fire happens."

So, in Howard vs. Albany Insurance Company, 3d Denio, 301, the Court says: "When the assured has no interest at the time the contract is made the fire policies the assured must have an interest at the time of the loss, as well as when the contract is made."

To the same effect are the following authorities:

Phoenix Ins. Co. vs. Benton, 87 Ind., 132-133.
Fowler vs. New York Indemnity Ins. Co., 26 N. Y., 422.
Aurora Fire Ins. Co. vs. Johnson, 46 Ind., 315-322.
Chrisman vs. State Ins. Co., 16 Ore., 288.
Commercial Fire Ins. Co. vs. Capitol City Ins. Co., 81 Ala., 321.
Dickerman vs. Ins. Co. (Vermont), 30 Atlantic, 808.
Henning vs. Western Assur. Co., 77 Ia., 319.
Waller vs. Northern Assur. Co., 64 Ia., 101.

But it is not only necessary that the assured should have an insurable interest, but he must have the insurable interest which the contract calls for. In other words, he must, as in this case, have at the time of the making of the contract, the unconditional and sole ownership.

"It is not sufficient even that the party have an insurable interest in the property. He must have such an interest as the contract specifies."

Tallmann vs. Atlantic Ins. Co., 29 Howard's Practice, 71-86.

A consideration of what may in general constitute an insurable interest is not of importance, where the policy defines the extent of the interest necessary; as a mere insurable interest is not sufficient, if it falls short of the actual requirements of the policy.

Thus in Wineland vs. Security Ins. Co., 53 Md., 276, the Court says: "The question before is us not whether the appellant had an insurable interest in the buildings insured, but whether by the terms of the contract into which he entered he had that kind of an interest, to-wit: title in fee to the land on which the houses stood, which the policy stipulates he shall have.

"Acceptance of the policy with condition as to absolute ownership amounts to a declaration that the interest is absolute."

Mers vs. Franklin Ins. Co., 68 Mo., 127.

Hinman vs. Hartford Fire. Ins. Co., 36 Wis., 159.

Fitchburg Savings Bank vs. Amazon Ins. Co., 125 Mass., 431.

Miller vs. Amazon Ins. Co., 46 Mich., 463.

"If the policy be once void it will not be revived by the fact that the assured subsequently acquires an interest."

Imperial Fire Ins. Co. vs. Coos County, U. S.

Supreme Court, 1894, and cases there cited.

Carpenter vs. Providence-Washington Ins. Co., *supra*.

Cockerill vs. Cincinnati Mut. Ins. Co., 16 O., 148-165.

Peabody vs. Washington County Mut. Ins. Co., 20 Barb., 339-341.

Diehl vs. Ins. Co., 58 Pa. St., 452.

Fabyan vs. Ins. Co., 33 N. H., 206.

Moore vs. Ins. Co., 62 N. H. 245.

The interest must be truly stated. Thus, where the insured was in possession of the property, having paid $2,680 of the purchase price, title to pass when balance of purchase price should have been paid. Held, that her interest was not truly stated, although it was true she had an insurable interest.

Lasher vs. St. Joseph, etc., Ins. Co., 86 N. Y., 423.

Ins. Co. vs. Bronger, 6 Bush. (Ky.) 146.

The Requisite Interest May be Measured by Other Considerations.

Thus the agreement in the mortgage clause for subrogation and assignment of the securities by the party to whom payment may be made, contemplates such an interest therein as would enable the Trust Company to make a complete assignment. This of itself would seem to involve of necessity the unconditional and sole ownership.

The subrogation clause is one which must be enforced. It is a material and important part of the contract to the terms of which the Courts give full effect.

Foster vs. Van Reed, 70 N. Y., 19.

Thornton vs. Enterprise Ins. Co., 71 Pa. State, 234-6.

By agreeing to make an assignment of the securities, the Trust Company warranted that it had the power to make such assignment.

Dick vs. Franklin Ins. Co., 10 Mo. Appeals, 376.

Affirmed in 81 Mo., 103-8.

But under the conditions existing on the 14th day of June, 1893, at which time the validity of the insurance is to be determined, the plaintiff could neither have assigned nor transferred the Gordon note, nor could it have compelled the Investor's Company to assign it. The inability of the Trust Company to make an assignment of the note at the time it claims to have made a contract of insurance with the appellee, shows the insufficiency of its insurable interest to meet the requirements of the agreement. If the Trust Company was the unconditional and sole owner of the note, it could transfer it. The provision for subrogation clearly contemplates that the hands of the party to whom payment is contemplated should not be tied in such event.

Where a party agrees to transfer an interest in lands for a certain term of years, and at the time of agreement he has not that interest, there is no contract. The plaintiff must have an interest which will enable him to perform his contract.

Routledge vs. Grant, 4 Bing., 653.

1 Langdell's Cases, 5-10.

And if the party were unable to make such an assignment, his right to recover would be defeated.

Davis vs. Quincy Ins. Co., 10 Allen, 113-117.

If the mortgagee had entered into a contract inconsistent with the right to assign the mortgage debt as was provided, it would be a valid bar to any recovery upon the policy.

Foster vs Van Reed, *supra*.

Where a policy has an express provision for subrogation, the assured cannot recover if he has made a contract with a railroad company whereby his power to make a subrogation is annulled.

Inman vs. South Car. R. R. Co., 129 U. S., 128.

Carstairs vs. Mechanics' & Traders' Ins. Co., 18 Fed., 473.

Niagara Ins. Co. vs. Fidelity, etc., Co. (Pennsylvania S. C.), 18 Ins. L. J., 301.

Again, the interest in the debt must be free from the claims and interests of other parties. But undoubtedly on the 14th of June, 1893, the actual ownership of the Gordon note was vested in the Investor's Company.

Two different parties, while they may have each an insurable interest, cannot have the same insurable interest at the same time in the same property. The relative interests of the Trust Company and the Investor's Company in this note at that time, and the fact that the Investor's Company were the real owners of the Gordon note, will come to light if we suppose the loss to have been made payable to Mahlon D. Thatcher, Trustee, under the policy, and that both the Trust Company and the Investor's Company had made claim to the benefit of the insurance. And supposing that one or the other, or both, were at the time insolvent, it would seem evident that the proceeds of any insurance money which might be paid to the Trustee, would belong to the creditors of the Investor's Company, and not of the Trust Company.

The general significance of the question thus presented will be appreciated when such a predicament is contemplated.

If now, the Investor's Company was possessed of the insurable interest requisite to support an insurance contract identical with that which is claimed by the Trust Company to exist in its favor, it follows that the Trust Company was not possessed of that requisite interest.

As a further test of the interest of the Investor's Company, it may be asked, in what way the Investors' Company was obligated to transfer the note to The International Trust Company? If not so obligated, the Trust Company had not acquired the right to say that these securities had been repurchased by it. Neither would the Trust Company be compelled to take over the securities under the then existing conditions. The consideration, if any, must be one of mutual promises. If such do not exist, there is no contract.

Chicago & G. E. R. R. Co. vs. Dane, 43 N. Y., 241.

Neither party is bound unless both are bound.

Langdell's Summary of the Law of Contracts, Sec. 10.

Even a "moral obligation" to relieve the Investor's Company of the note would be no consideration for a promise to buy the note. The notion of a moral consideration has had no countenance since the case of Eastwood vs. Kenyon.

Langdell's Cases, 343 (Summary), pages 1025-6.

The entire transaction upon which the claim to a repurchase of the note is based having been carried on by correspondence, the effect of that correspondence and whether or not it showed a repurchase of the note prior to June 14, 1893, presents a question of law; and the mere circumstance that the trial court incorporated the legal conclusion here called for into its findings of fact does not preclude an Appellate Court from inquiring into the legal effect of the correspondence, and reviewing as a matter of law what the trial court has erroneously termed a "*finding of fact.*"

Letters and other writings upon the contents of which a contract is claimed to exist are construed by the Courts as matters of law.

Arnold vs. Bailey, 24 S. C., 494; 3 Am. and Eng. Enc. of Law, 867.

Dwight vs. Germania Life Ins. Co., 103 N. Y., 342.

Hamilton vs. L. & L. & G. Ins. Co., 136 U. S., 242.

Barton vs. Grey, 57 Mich., 623.

The correspondence, when summarized so far as relates to the matters under review, shows that shortly before the note matured, Cuyler, Morgan & Co., the New York correspondents of The Scottish Investor's Company, transmitted the Gordon note to the plaintiff below *for collection*. (Record, page 51.)

Having found that Gordon could not pay the note, the plaintiff, on June 12th, remitted the accrued interest, $1,750, to Cuyler, Morgan & Co. (this interest being paid to the Trust Company by Gordon on June 19th, thereafter—record, page 75), and informed Cuyler, Morgan & Co. that as the plaintiff, the Trust Company, was authorized to reinvest the money, they had arranged to extend the loan six months (page 52).

Plaintiff also on June 12th cabled the Scottish Company to the same effect as it had written Cuyler, Morgan & Co., and added: "Can take loan ourselves soon, *if desired*. Await our letter of this date." The letter referred to of that date said: "We will, just as soon as possible, take up the Gordon loan ourselves, *if you desire it*, and remit the money to Cuyler, Morgan & Co. to your credit. Please wire us what your wishes are, and we will arrange to conform to them."

In a letter of the following day (June 13th), in answer to advices received that day from the Scottish Company under date of May 31st, to the effect that on repayment of the Gordon loan they would require the money, the Secretary of the plaintiff company further wrote: "The best I can do under the circumstances is to say that we will ourselves, *just as soon as possible, if you desire it*, take up the loan and carry it ourselves. We would do so immediately, but for the fact that times have been very hard here and we have been compelled to renew loans, etc. * * * You need not have any anxiety about this loan or security, for *whilst we do not legally guarantee any loan*, we always stand back of our correspondents and protect them, and at any time we would rather take up a loan than to have them dissatisfied. To be perfectly frank, it would be quite an inconvenience to us to take up this loan at present, as we need all of our money, and if entirely agreeable to you we would like to have the privilege of taking it up at any time within sixty days from its maturity."

The Scotch Company, on June 14th, merely acknowledged receipt of plaintiff's cablegram of the 12th, and said: "We accordingly wait your letter." But on June 26th, in answer to the letter which was received that day, cabled: "Have received your letter 13th of June. *We will delay until 15th of September.*" This cablegram was confirmed by letter of June 28th (received July 15th), which, after expressing regret that their commitments would necessitate asking repayment of the loan, said (page 56): "Our Directors ask us to thank you for your kind offer to relieve them of this loan. They do not desire to inconvenience you by asking you to relive them of it at the present time, but they would like that you should make such arrangements as would enable you to take it over from us at a date not later than the 15th of September next."

The plaintiff replied to the above cablegram of the Scotch Company, which was received on June 26th, as follows (page 55): "This is satisfactory to us, and we will arrange to take up the loan at that time. We would do so now, but, as we wrote you, it would be quite an inconvenience for us, in view of the hard times."

There was no answer made to the letter of June 28th, which was not received until July 15th; and no further correspondence passed until July 21st, when the plaintiffs wrote the Scotch Company, enclosing the note and asking that it be endorsed to

John F. Bell, Trustee, saying: "We will hold the same, and be responsible for it," etc.

The receiving of the note by the Scotch Company was acknowledged by a letter of August 5th, and on August 9th the note was endorsed by the Scotch Company to "John F. Bell, Trustee, for Investor's Mortgage Security Company, Limited," and was transmitted with a letter saying (page 57): "The Directors, at their meeting to-day, authorized the endorsation of this note to you as Trustee, and we now send same herewith so endorsed. Kindly acknowledge receipt of same *and hold it for collection.* We trust that it will not put your company to any great inconvenience to make payment of the same on the 15th of next month."

It seems that by a letter of August 21st, from the Scotch Company, which letter was not produced by the plaintiffs, but is referred to in a letter of September 5th (page 58), the Scotch Company proposed to extend the Gordon loan for one year from September 15th, at nine per cent. interest, the plaintiff to give its obligation for the same, and placing in the hands of bankers in New York, as security, the Gordon note, with some additional collateral. To this the Trust Company assented. On September 23d, under an arrangement as to further collateral, made on September 10th (page 59), with Mr. Guild, one of the Secretaries of the Scotch Company, who was in Denver at that time, the plaintiff company made a remittance to Cuyler, Morgan & Co. of $10,000 upon account, with the accrued interest on the note to September 12th, together with the plaintiff's own note for $40,000 and the Gordon note itself as collateral security, with other collateral, amounting, in all, to $61,000. The $40,000 note of the plaintiff was finally paid in January, 1894, some months after the fire, which, it is presumed, released the collateral securities held by the Scotch Company, including the Gordon note.

No entry was made upon the books of The International Trust Company indicating a repurchase of the Gordon note, until the latter part of September, 1893.

So far as this case is concerned it is not necessary to go into this correspondence beyond June 28th, 1893, for the letter of that date shows conclusively that on the 14th of June, 1893, the date of the policy, the Trust Company had not repurchased the Gordon note. Yet that conclusion may be strengthened by a knowledge of the contents of the subsequent correspondence and may throw some light upon the case. We therefore ask the indulgence of the Court if we go still more minutely into this question.

These letters and telegrams of June 12th, from the Trust Company to Cuyler, Morgan & Company, and to the Investor's Company, are considered by the Trust Company to partake of the form of an offer or proposal and somewhere in the subsequent correspondence the Investor's Company are supposed to have accepted the offer and thereby created a contract of repurchase relating back to June 12, 1893, even though the note was not finally transferred for several months. In the first place, those letters of June 12th contain no offer. The substance is that the Trust Company had arranged an extension of the note as the agents of the Investor's Company; but at some day, "in a short while," if the Investor's Company desire it, the Trust Company will take up the loan. There is nothing definite about that; neither time, nor terms. It is more nearly like saying to the Investor's Company: "Do you desire to sell the Gordon note? If so, we will consider whether we will make a proposition of repurchase some time in the next few weeks." It is more nearly the opening of negotiations looking to a subsequent repurchase of the note. (See Aheurn vs. Heirs, 36 Mich., 692; Langtur vs. Schaffer, 31 Mo., 690; Moulton vs. Kershaw, 59 Wis., 316). There was no letter after those of June 12th until after the policy was written; there was not even an offer then at time policy was written.

But for the purposes of the argument we will treat the letters of June 12th as containing an offer of repurchase. There was no reply until June 26th, and then it was, "We will delay till September 15th." Delay what? Delay the sale of the note to Trust Company? If so, then the Trust Company did not own the note on June 14th. Delay the collection of the note? Perhaps, so as to allow the Trust Company to arrange to get the money to straighten out the alleged unauthorized extension of the note it had made. Perhaps it meant that they would delay until September 15th to decide what they would do in the case. There is nothing in the letter of June 12th of which it is an acceptance. There must be an unequivocal acceptance of an offer to constitute a contract. It must be upon the same terms; an equivocal acceptance is a rejection of the offer.

"It is an undeniable principle of the law of contracts that an offer of a bargain by one person to another, imposes no obligation upon the former until it is accepted by the latter according to the terms in which the offer was made. Any qualification of or departure from those terms invalidates the offer, unless the same be agreed to by the person who made it. Until the terms of the agreement have received the assent of both parties, the negotiation is open and imposes no obligation upon either. By the offer, an answer was to be returned 'to us at Harper's Ferry.' The acceptance was sent by letter to Georgetown. The Court says, whatever uncertainty there might have been, as to the time when the answer would be received, there was none as to the place to which it was to be sent, which was distinctly indicated by the mode pointed out for the conveyance of the answer. The place, therefore, to which the answer was to be sent constituted an essential part of the plaintiff's offer. The offer, it is true, was accepted by the terms of the letter addressed to Georgetown and received by the plaintiffs at that place, but an acceptance communicated at a place different from that pointed out by the plaintiffs, and forming a part of their proposal, imposes no obligation binding, upon them unless they acquiesce in it, which they declined doing."

Elias vs. Henshaw, 4 Wheat., 225.

A proposal to accept, or an acceptance upon terms varying from those offered is a rejection of the offer.

National Bank vs. Hall, 101 U. S., 50.
Ortman vs. Wheeler, 11 Fed., 360.

The record contains nothing showing an unequivocal acceptance of the so-called offer of June 12th. By letter of June 28th, the Investor's Company say that they would like to have the Trust Company arrange to take over the note on September

15th. Is that the equivalent of saying, "We will sell you the note, now," or "we accept your offer?" No. The Trust Company might not be able to make the arrangement on September 15th, and the so-called offer was to take up the note on August 12th. The terms of the so-called offer were, therefore, qualified. The legal effect of that qualification is a rejection of the so-called offer of June 12th. Where does the insurable interest on June 14th, then, come in? This rejection was made on June 28th. But if this letter of June 28th was an acceptance, it would not differently affect the proposition, for a contract dates from the acceptance; not from the offer. There is no contract until there has been an acceptance.

Wire Mfg. Co. vs. Broderick, 12 Mo. App., 378.

Bishop on Contracts, 322.

Minn., etc., R. R. Co. vs. Columbus Rolling Mills Co., 119 U. S., 149.

So that if the letter of June 28th was an acceptance, the contract dates from June 28th, and not June 12th, the date of the so-called offer. Therefore, on June 14th, the date the policy was issued, there was no contract.

This co-called offer and acceptance were carried on by correspondence. Where there is an offer by letter and acceptance by letter, the contract dates from the date of the deposit of the letter of acceptance in the mail.

Levy vs. Cohen, 4 Ga., 1.

Shattuck vs. Ins. Co., 4 Clifford, 598.

Taylor vs. Ins. Co., 9 How. (U. S.), 390.

The same is true where the telegraph or cable is the means of transmission.

Minn. Oil Co. vs. The Collier Lead Co., 4 Dillon, 431.

The so-called acceptance does not relate back to the date of the so-called offer, to-wit: June 12th. Where an offer is made on one side and accepted on the other, the acceptance does not relate back to the time of proposal.

Felthouse vs. Brindley, 11 Common Bench (N. S.), 869.

People vs. Lee, 7 Cent. Rep. (N. Y.), 35.

It is evident, therefore, that the letter of June 12th is not, in the true sense, an offer. If it was, it was not accepted, in any event, until June 28th, fourteen days after the issuance of the policy, and the ownership of the Gordon indebtedness, therefore, remained in the Investor's Company until that date. But it is likewise evident that this letter of June 28th is not an acceptance. It is rather a rejection of the so-called offer contained in the letter of June 12th.

Let us, therefore, go further into the transaction and see when this repurchase by the Trust Company did take place.

The letter of the Investor's Company of June 28th added nothing to the transaction save to elaborate the cablegram of the 26th. If it constituted a new offer, it did not take effect as such until its receipt, which was not until July 15th, and, therefore, need not be considered; and if it did constitute a new offer, then there was no acceptance of it, because there was no reply made to it. As an elaboration of the cablegram, it may be of use merely to explain what might otherwise be obscure in the cablegram itself, as a similar use may be made of the subsequent correspondence.

We inquire, therefore, what, in purport and legal effect, was this cablegram saying, "We will delay until 15th of September"? In terms, this can be called neither a proposal nor an aceptance.

The Investor's Company thereby declared, in effect, that they would hold the matter in abeyance until the 15th of September. This was not an indulgence or forbearance of any legal obligation of The International Trust Company, for there was no such obligation existing; it was a forbearance simply in the sense that the Investor's Company proposed not, for the time being, to pursue or enforce the collection of the note, nor to insist upon the Trust Company then and there becoming the purchaser of the note, being in the hope, as expressed in the letter of June 28th, that the Trust Company should make such arrangements as would enable them to take over the note at a date, not later than the 15th of September.

Prior to this cablegram The International Trust Company had been urging an extension of the note, even going so far as to declare to the Investor's Company that which the record discloses was not true, viz.: That they had, in reliance upon a supposed authority to reinvest, given an extension of six months! To the appeal for an extension, the Trust Company had added: "We will ourselves, just as soon as possible, *if you desire it*, take up the loan and carry it ourselves," and, "if entirely agreeable to you we would like to have the privilege of taking it up * * * at any time before August 12th."

This was before the Investor's Company said anything at all about disposing of the note to the Trust Company.

To this appeal the Investor's Company replied: "We will delay until 15th of September." And to this the Trust Company replied: "This is satisfactory to us, and we will arrange to take up the loan at that time."

But if the letter of The International Trust Company, asking the privilege of taking up the note at any time before August 12th, can be construed as a legal proposition to buy the note, then that proposal was not accepted, for the Investor's Company simply replied thereto: "We will delay until 15th September."

If this cablegram of the Investor's Company constituted either an acceptance or an offer, it must have been the latter, because it varied in its terms from anything which had been proposed by the Trust Company. An acceptance, not according to the terms of the offer, is a rejection of the offer and in effect a new offer.

First Natl. Bank vs. Hall, 101 U. S., 43-50.
Carl vs. Duval, 14 Peters, 75, and cases there cited.

It would seem that, under such circumstances, the Investor's Company would remain the owner of the note until September 15th. No terms of purchase are proposed or contemplated in this correspondence, and it is not until late in August that the parties take up a consideration of terms of purchase, and in September reach an agreement upon such terms. We do not see how this correspondence, therefore, can be regarded as in any sense a purchase of the note prior to June 14th, 1893 or that the title of the note or the ownership thereof changed until the contract of repurchase was completed. Nor does it appear that by virtue of this correspondence the Trust Company had acquired at the time this policy was issued, such an insurable interest by contract as would be necessary to support the insurance contract sued upon.

"In order to make a contract there must be a proposal and an acceptance. In order to convert a proposal into a promise, the acceptance must be absolute and unqualified.

Pollock on Contracts (Wald's 1st Amer. Ed., page 22, cases collated.)

Eliason vs. Henshaw, 4 Wheaton, 225.

Bishop on Contracts, sections 322-323.

Wire Mfg. Co. vs. Broderick, 12 Mo. App., 378.

Minn. R. R. Co. vs. Columbus Rolling Mills Co., 119 U. S., 149.

So that, if an acceptance be qualified, or contain terms different from the proposal, it amounts to a new proposal. There could accordingly be no purchase until there had been a proposal and an unqualified acceptance.

A contract, moreover, is made at the date of the acceptance, and does not relate back to the time of the offer.

Langdell's Summary and Law of Conts., Sec. 10 (also 7-8-9).

Felthouse vs. Brindley, 11 Common Bench, 869.

People vs. Lee, 7 Central Rep., 35.

It follows that the repurchase of the note could not in any event have related back to the date at which the Trust Company first indicated its readiness to take over the note, if desired so to do by the Investor's Company. But the Court of Appeals held that the repurchase was made on the 12th day of June, and that the insurable interest of the Trust Company *which supported the contract of insurance* dated from that day. It is contended by the peti-

Nor will this result be changed by the fact that the local agent, Morris, of the plaintiff in error, accepted the premium, in September, 1893. The findings of the Court and the record disclose that Morris was unaware either of the sale of the note, in the first instance, by the Trust Company to the Investor's Company, and knew nothing of the alleged repurchase, but, in fact, considered at all times that there had been no change in the ownership of this note. Therefore, Morris, by accepting the premium, did not infuse life into the policy. Besides, the findings show that the premium thus paid was tendered back, with accrued interest and all the costs which had accrued in the suit when the facts were disclosed.

The authorities hereinbefore cited to the proposition that a void policy is not revivified are in point. There can be no waiver of a forfeiture, unless the same is made with full knowledge of all the facts and conditions.

Ins. Co. vs. Young, 5 So. Rep., 117.
Beatty vs. Ins. Co., 66 Pa. St., 9.
Shrimp vs. Ins. Co., 16 N. E. Rep., 229.

IV.

THE CONDITIONS OF THE POLICY WERE NOT COMPLIED WITH IN REGARD TO THE ASCERTAINMENT OF THE AMOUNT OF LOSS, THE FURNISHING OF PROOFS OF LOSS, AND THE DATE OF BRINGING SUIT. THE COURT OF APPEALS FAILED TO CONSIDER THESE QUESTIONS, THOUGH PROPERLY PRESENTED. THE NON-COMPLIANCE THEREWITH DEFEATS THE ACTION.

ASCERTAINMENT OF THE AMOUNT OF LOSS.

Plaintiff in error maintains that even if the policy was a valid policy, the defendant in error was not entitled to recover, because it had not complied with the conditions required by the contract of insurance. It is well settled that conditions precedent in policies of insurance as to the ascertainment of the amount of loss, the bringing of suit, and the furnishing of proofs of loss, must be complied with before a suit can be brought. As to these questions, the trial Court made special findings of fact, but before those special findings of fact were made, the defendant below moved the Court for a finding and judgment in favor of the defendant, on the ground that upon all the evidence the plaintiff was not entitled to recover. Consequently, if for any reason the plaintiff had not proved its case, the finding should have been for the defendant. To determine whether the plaintiff had proved its case, this request for a declaration of law required the nisi prius Court to review the testimony in regard to the ascertainment of the amount of loss, and the furnishing of proofs of loss, and the bringing of suit. The law question thus presented was passed upon by the trial Court in the course of the trial, adversely to the defendant; and the Court of Appeals, under the decisions cited to that proposition, in a latter part of this brief, should have reviewed that testimony to see if there was any testimony to support the findings made by the trial Court in that regard. The policy provides:

"This company shall not be liable beyond the actual cash value of the property at the time any loss or damage occurs, *and the loss or damage shall be ascertained or estimated* according to such actual cash value, with proper deduction for depreciation, however caused, and shall in no event exceed what it would then cost the insured to repair or replace the same with material of like kind and quality; *said ascertainment or estimate shall be made by the insured and this company, or, if they differ, then by appraisers, as hereinafter provided;* and, the amount of loss or damage having been thus determined, the sum for which this company is liable, *pursuant to this policy shall be payable sixty days after due notice, ascertainment, estimate and satisfactory proof of the loss have been received by this Company in accordance with the terms of this policy.*

"In the event of disagreement as to the amount of loss, the same shall, as above provided, be ascertained by two competent and disinterested appraisers, the insured and this company each selecting one, and the two so chosen shall first select a competent and disinterested umpire; the appraisers together shall then estimate and appraise the loss, stating separately sound value and damage, and, failing to agree, shall submit their differences to the umpire; and the award in writing of any two shall determine the amount of such loss; the parties thereto shall pay the appraiser respectively selected by them, and shall bear equally the expenses of the appraisal and umpire."

"This company shall not be held to have waived any provision or condition of this policy or any forfeiture thereof by any requirement, act, or proceeding on its part relating to the appraisal, or to any examination herein provided for; and the loss shall not become payable until sixty days after the notice, ascertainment, estimate, and satisfactory proof of the loss herein required have been received by this company, including an award by appraisers when appraisal has been required."

"No suit or action on this policy, for the recovery of any claim, shall be sustainable in any Court of law or equity until after full compliance by the insured with all the foregoing requirements, nor unless commenced within twelve months next after the fire."

By this last clause no action is maintainable until after *all* the conditions have been complied with; not that of *arbitration* but *all* others. By the first clause there must be an *ascertainment* of the amount of loss, and two ways are provided to reach it, but it must be made. By the third clause the loss shall not be payable until sixty days after the ascertainment. Whether the *arbitration* is had as provided in second clause or not, there must be an *ascertainment* before the loss is payable and before a suit can be brought. Ascertainment and arbitration are not synonymous terms here. They are separate and distinct.

137 U. S., 370.

We are not ignorant of the decision in the Kahnweiler case, 67 Fed., 484; but the cases are distinguishable. So far as the report shows, that case does *not provide that loss shall be payable only when an ascertainment has been had; nor does it provide that the ascertainment shall be had before suit is brought. It simply provides that suit shall not be brought until the arbitrators have made their award.* And the Court held that where no demand is made for the appointment for the arbitrators the arbitration is waived; but even if we apply that rule here, we are still confronted with the fact, that an *ascertainment* of the amount of loss must be made before the loss is payable, or before a suit is brought. If the arbitration is waived, then only one way of determining the amount of loss has been exhausted.

The prohibition in the case cited only goes to the arbitration; here it goes to the arbitration and the ascertainment. Arbitration is only one way of reaching an ascertainment. Nor can it be open to the objection made in that case that all the Insurance Company need do to defeat the action, would be, to refuse to arbitrate if the condition be taken literally, because if there was a failure to call for an arbitration, still the Insurance Company must join in making an ascertainment. To waive *arbitration* does not waive *ascertainment* of the amount of loss. The very terms of clause three shows that arbitration is only one way of ascertaining the amount of loss. It says, loss shall not be payable until ascertainment, etc., including an award by appraisers when appraisal has been required. If no appraisal by arbitration has been required, still reading the rest of the clause, there must be an ascertainment. It is then a condition, and the last clause says, the conditions must be complied with before the loss is payable or suit is brought.

The Kahnweiler case does not go that far. It simply says, no suit shall be brought till an *award*. To be similar to that case our third clause would have been read without the word *ascertainment* in it all. The word must be given some force.

These provisions are conditions precedent (Ins. Co. vs. Thorp, 28 Pacific, 991), and must be complied with or a waiver shown. They are legal, valid and binding.

Hamilton vs. Ins. Co., 136 U. S., 242.
Seward vs. City of Rochester, 109 N. Y., 164.
Hamilton vs. Ins. Co., 137 U. S., 370.
Ins. Co. vs Alvord, 61 Fed., 755.
Richards on Ins., page 182.

Where the policy provides for an arbitration, but contains no clause prohibiting suit till arbitration is had, then it is held a collateral contract, and a suit is maintainable. (Ins. Co. vs. Alvord, *supra*; Reed vs. Wash. Ins. Co., 138 Mass., 572; Hamilton vs. Ins. Co., *supra*.) But where the clause prohibiting suit is found there must be an arbitration. (Hamilton vs. Ins. Co., *supra;* Ins. Co. vs. Alvord, *supra;* Seward vs. City of Rochester, *supra*.) The clause in in this policy is not that the arbitration alone shall be had, but all of the conditions of the policy must be complied with. Now, one condition was than an ascertainment must be had of the amount of loss, even before the loss is payable. Hence the above authorities on principle are conclusive of the question. There was no waiver of the ascertainment. *The trial Court found that no demand for an arbitration had been made by either party, but did not find there had been no demand for ascertainment.* This Court may examine the evidence to determine whether an ascertainment was had or sought, because at the close of all the evidence the Insurance Company asked for a peremptory rule that the evidence would not support a finding for the Trust Company.

In the letter of January 5th, 1894, by State Agent Piper, the Insurance Company (Exhibit "38," page 164, printed record) seem to have asked for information for the purpose of making an ascertainment of the loss. There seems to be no testimony whatever going to show that an ascertainment was ever made, but from reading the whole testimony it is conclusively apparent that none was made. Indeed, the trial Court allowed the Trust Company to prove over the objection and exception of the Insurance Company what the amount of loss was. (See testimony of Decamp, page 181, printed record; Good on page 174, and Bearmont, page 182, and Exhibits Nos. "22," "38," "41-9.") We have assigned as error the ruling admitting this evidence.

Should this Court seek to apply the rule it tested the Kahnweiler case by, viz., that there was no demand (there) for arbitration (here ascertainment), we maintain that the evidence is sufficient to show an attempt on the part of the Insurance Company to arrive at an ascertainment with the Trust Company of the amount of loss. By the letter of January 5, 1894 (page 167 *et sequitur* of printed record), the Insurance Company asked the Trust Company to furnish all contracts and estimates for material and labor that went in the building, and the cost of said labor and material, the plans and specifications, etc. There was enough in that letter to notify the Trust Company that the Insurance Company did not agree with its valuation of the loss. (See Hamilton vs. Ins. Co., 61 Fed., 386.) We submit that from a perusal of that letter and the testimony of witness, Piper, it will become evident that an effort was made on the part of the Insurance Company to obtain an ascertainment, but that no ascertainment was ever had and never waived and therefore the suit could not be maintained.

And it was error to admit the testimony on the amount of loss, for it was only pertinent in case there had been shown an effort on the part of the Trust Company to perform the condition as to ascertainment. And we further say that the loss never became payable until sixty days after an ascertainment, therefore the suit was prematurely and improperly brought, for no ascertainment was ever had.

But it may be said no ascertainment was necessary for you denied liability. Here again the evidence must be reviewed. The trial Court made an equivocal, conditional and uncertain finding on this question (printed record, page 131), but it is wholly and entirely unsupported by the evidence. In the first place the proofs of loss that were furnished were all furnished after the alleged denial of liability. By letter of January 12, 1894 (being Exhibit "41," page 170, printed record), the Trust Company says: "We are inclined to give your company every facility possible for the full consideration of this case, and I trust that after examination you will recognize the equity of our claim." Piper says he never did deny liability until suit was brought. (Record, pages 109, 113, 114.) By letter of February 21, 1894, after suit was brought, Piper did deny liability, but never before. Hobson, the Vice-President of the Trust Company, attempts to create the impression that there was a denial of liability, but his evidence is more inferential than direct. He claims to have had a conversation with Piper, wherein Piper set forth the reasons why the Insurance Company was not liable. On cross-examination he says that the understanding was that that conversation was not to prejudice the rights of either party, and that Piper did not say the company would not pay. (Printed record, pages 121, 122.) These conversations were in November and December of 1893. The additional proofs were furnished in January, 1894. Hobson also says that Packard, Piper's partner, came to him and asked him not to bring suit, saying the company would pay. Thus it is seen that all the evidence shows beyond peradventure that there never was a denial of liability, and if any part of it could be so construed the Trust Company waived it, for it furnished the additional proofs of loss thereafter and did not rely upon it. We conclude therefore that the ascertainment of the amount of loss was never waived and never complied with, and the conditions of the policy uncomplied with defeat the action.

PROOFS OF LOSS—SUIT PREMATURELY BROUGHT.

The policy provides (ante, page ——): "Loss shall not become payable until *sixty days* after the notice, ascertainment, estimate and *satisfactory* proof of the loss herein required have been received by this company."

The proof of loss must be a *satisfactory* one, and the *sixty days* only begin to run after the satisfactory proof is furnished.

"These provisions are cumulative and are to be construed together. Their meaning is that the assured's right of action shall not be exercised until there has taken place both the delivery of satisfactory proofs and the passage of sixty days thereafter."

Gauche vs. L. & G. Co., 10 Fed., 348.

The policy likewise says: "No suit or action on this policy for the recovery of any claim shall be sustainable in any Court of law or equity until after full compliance by the insured with all the foregoing requirements."

That the proof must be satisfactory is one of the requirements. These provisions are conditions precedent, and must be complied with or a waiver shown.

The assured, therefore, can in no case maintain an action until sixty days after he has rendered proofs which are *to be deemed* satisfactory, because they are accepted by the insurers, or *are* satisfactory, whether accepted or rejected by the insurers, because they perform the promise contained in the contract. * * * The sufficiency of preliminary proofs, there being no question of waiver involved, is a question of law for the Court, and not a question for the jury."

Gauche vs. Ins. Co., 10 Fed., 347.
Ins. Co. vs. Seyforth, 29 Ill., Ct. App., 513.
Ins. Co. vs. Thorp, 28 Pac., 99.
Doyle vs. Ins. Co., 44 Cal., 264.

So it is said that after the proofs are made satisfactory, the Insurance Company has sixty days in which to pay. Those sixty days do not begin to run until after all additional or amended proofs are furnished. It requires the additional or amended proofs to make them satisfactory. They certainly cannot be said to be satisfactory where request for additional proofs is made, until that request has been complied with.

"The policy provided that the loss was to be paid sixty days after due notice and satisfactory proof of such loss." Held, that the stipulated sixty days was the period between the reception of the *satisfactory* proofs and the time of payment, and not the period between the tendering of any proofs and the aceptance, if satisfactory.

Hamilton vs. Phoenix Ins. Co., 61 Fed., 379.

The trial Court made findings upon this matter (printed record, page 130) which are to the effect that proofs of loss were furnished on the 3d of November, 1893, in compliance with the requirements of the provisions of the policy, and that on the 16th of January, 1894, the Trust Company voluntarily furnished a notice to the Insurance Company that by mistake it had included in its proofs of loss a policy of insurance issued by The Alliance Assurance Company, of London, for $10,000, under which the Trust Company had no legal claim, and on having discovered the mistake, desired to correct the same. The Court also found that the facts in relation to this Alliance policy were known by the Insurance Company soon after the destruction of the hotel by fire, and that no objection was ever at any time made by the Insurance Company on account of the mention of the Alliance policy in the proofs of loss. This requires a review of the evidence.

We maintain that there is no evidence to support the proposition that the proofs of loss of the 3d of November were in accordance with the requirements of the policy, and that the Trust Company did not so consider it, because they furnished other proofs and that the additional proof of January 16, 1894, was furnished voluntarily, and that at no time after the furnishing of the first proof, on the 3d of November, 1893, did the Trust Company inform the Insurance Company that it had waived its right to the second alliance policy; and that, therefore, the finding of the Court was erroneous, and as it is reviewable, we will go into the evidence.

The evidence in this case discloses that the original proof of loss was furnished on the 3d of November, 1893; that on the 12th of January, in compliance with the request of the Insurance Company, made on the 5th of January, 1894, the Trust Company furnished an additional proof of loss containing valuable, material and useful information, which the Insurance Company would be likely to use in determining whether the conditions of the policy had been complied with, and in determining the question of liability. This additional proof of loss is Exhibit "22," and is found at page 155 of the printed record, and ends at page 161 thereof. It is an exhaustive and thorough statement and answer to the questions propounded in the letter of January 5. It was transmitted along with Exhibit "41," of the printed record, page 170, which is a letter from the Trust Company to the Insurance Company's general agent, in which the Trust Company says: "We have taken a great deal of trouble and pains to supply this information, and I trust it is satisfactory. * * * If the information now furnished you is not satisfactory, please state wherein it is unsatisfactory." This correspondence shows that the proofs furnished on the 3d of November were not satisfactory.

On the 16th of January, 1894, the Trust Company voluntarily furnished a new proof of loss. (Hobson's testimony, printed record, page 120.) That proof of loss is marked Exhibit "23," and is set out at page 161 of the printed record, and begins as follows:

"To the Sun Insurance Office: You will please take notice that we herewith beg leave to correct and amend the proofs of loss heretofore filed by us upon the Mesa Hotel property, Pueblo, Colorado, as follows:

"That, whereas, in our original proofs we claimed that we held two policies of The Alliance Assurance Company for $10,000 each, making a total insurance as claimed by us of $50,000, we now claim only one policy issued by The Alliance Company for our benefit at the time the proofs were made; and upon information which we then had, we believed and so stated that on the 4th of October, 1893, The Alliance Assurance Company had issued a second policy and which was in full force and effect at the time of the fire. From information since derived, we are satisfied that we are mistaken, and we have no legal claims against The Alliance Assurance Company upon such policy; and we further beg leave to notify you that The Alliance Assurance Company has paid in full the first policy issued for our benefit, as shown in our proofs."

This was a correction and amendment of the first proof of loss. It was material, because in case the insurance upon this property, *in toto*, amounted to a less sum than the value of the property, under the subrogation clause the Insurance Company might have paid the whole insurance and have taken the property.

It is thus seen that the proofs of loss were voluntarily corrected and amended about thirty days before the bringing of suit. The Insurance Company, on the 13th day of January, 1894, practically admitted that the proofs were satisfactory, but this was only about forty-five days before the bringing of suit. Mr. Hobson was particular to have Mr. Piper say on the 13th of January, in the presence of Mr. Gibson, that this additional information furnished on the 13th of January was satisfactory.

"I explained to Mr. Piper what they were (referring to the additional proofs), and when I got through I said to Mr. Piper that we had furnished him everything that he had called for, and we had gone to a great deal of trouble and expense in doing it, and we hoped that it was satisfactory. Mr. Piper said of course that they would not put us to any great trouble or expense. * * * I asked him if they were satisfied, and he said he thought they were." (Printed record, page 119.)

Mr. Gibson testified, printed record, page 116:

"Mr. Hobson offered some papers (additional proofs), and Mr. Piper said that he thought those would be all that were necessary; he would look them over, and if anything further was necessary, that he would let him know."

Now, this interview occurred on the 13th of January, 1894. It is evident that these proofs were not considered satisfactory until that date at least, and that, according to the provisions of the policy, suit could not be brought until sixty days thereafter. Consequently this case comes directly within the Gauche case, *supra*, and the suit was improperly brought.

The Trust Company claims that the agents of the Insurance Company knew the facts in regard to the Alliance policy soon after the fire, and never made objection to the proofs on that account. The letter of January 5th, requiring additional and further proof from the Trust Company, mentions that the proof is incorrect and incomplete in that by the alleged proofs of loss it appears that there was $50,000 insurance, when the Insurance Company had reason to believe that there was not that amount, and that certain of the policies which the Trust Company claimed were written. the Insurance Company had reason to believe were never written.

It is thus seen that the finding of the Court is not correct on that proposition. There was nothing after the claim was made, so far as the evidence discloses, by which the Insurance Company was led to believe that the Trust Company abandoned its claim to the second Alliance policy, until the furnishing of that proof of loss. Consequently, the claim that the

Insurance Company knew or might have known that the Alliance policy was not a valid policy, cuts no figure; but the question is whether or not the Trust Company claims that it was, and they did claim it, in their proof of loss, and did not renounce the claim until the 16th of January. Mr. Hobson says (printed record, page 120), at the time he discussed the question of liability with Piper, that he asserted liability on the Alliance policy.

The Trust Company will probably take the ground that they were not obliged to furnish the additional proof of January 12th, and that they expressly did so without waiving their rights to insist that the sixty days had already elapsed, and that their right of action had then accrued. These proofs were furnished in compliance with their offer contained in their original proof on November 3d to furnish any additional proof which might be asked for. Accepting the provisions of the offer on the 5th of January, the Insurance Company asked for additional proofs. In compliance with that request the proofs were furnished on the 12th of January.

The policy provides that such a proceeding may be had, and we believe that the Trust Company would be estopped from claiming that they were not bound by the furnishing of proofs on the 12th of January, because they offered to do so in their original proofs, and did so when requested. But further than that, there never was *an acceptance of the proofs* until the 13th of January, and the Trust Company never considered that there was an acceptance of it, and the proofs were *never considered as satisfactory* until the 13th. In addition to that fact, we see that the Trust Company voluntarily furnished proofs on the 16th of January, so that it is apparent that satisfactory proofs were never furnished until about the middle of January, possibly the 13th, but more likely as of the 16th of January, and that thereafter, the Insurance Company had sixty days in which to pay, but in the meantime the Trust Company brought suit.

The furnishing of an additional or amended proof makes the time within which the loss is payable (here the sixty days) commence to run from the time of the furnishing of such amendment or additional proof.

Gauche vs. L. & G. Co., 10 Fed., 351.

It will be said, however, that the Insurance Company denied all liability, and therefore the Trust Company need not furnish proofs. We have seen that the testimony in this case does not support such a proposition, in discussing the question of the denial of liability in connection with the ascertainment of the amount of loss. There was no denial of liability, and further than that the Trust Company furnished the proofs of loss after the so-called denial of liability. Their doing so estopped them from claiming that there was a denial of the liability, if there ever was a denial, and estopped them from claiming that satisfactory proofs of loss were furnished on the 3d day of November, 1893.

"Where an insurance company in good faith, after its adjuster has, with its approval, notified the assured that his loss will not be paid, sends blank forms to the assured's attorney in reply to a letter from him asking why the loss will not be paid, and states that if the assured will present proofs of loss in accordance with the policy it will consider the matter, *this amounts to a withdrawal of its waiver of proofs of loss by refusal to pay the loss in the first place*, and if the assured fails to present proofs, as required by the policy, he cannot recover."

Hahn vs. Guardian Ins. Co., 32 Pac., 683.

In that case the adjuster denied all liability, and at a latter day the Insurance Company said that if proofs would be furnished they would consider them. Proofs were not furnished, and the assured was held not to have complied with the provisions of the policy.

If that be good law, and we believe it is, then it is directly applicable to show a withdrawal by the Insurance Company of its waiver of proof of loss by refusal to pay the loss in the first place (if the Court considers that there was a refusal by the alleged denial of liability), by its letter of January 5, 1894, asking for further proofs; and the case at bar is much stronger than the case cited, because there was no compliance there. Here there was a compliance. The Trust Company furnished the proof on the 12th of January, which would estop them from claiming that there was a waiver of satisfactory proofs.

We conclude, therefore, that the evidence in this case discloses, in the first place, that satisfactory proofs of loss were never furnished until the 13th of January, and that even thereafter, on the 16th, the Trust Company voluntarily amended its proof, and that before the expiration of sixty days thereafter this suit was brought, and that there was no waiver on the part of the Insurance Company in any way of the requirement of satisfactory proofs. And we further conclude, therefore, that under the provisions of the policy, this suit was prematurely and improperly brought, and not maintainable.

V.

THE TWO MORTGAGE CLAUSES ATTACHED TO THIS POLICY CONSTRUED.

Attached to the policy were two mortgage clauses. There was no specific finding by the Court as to which of these clauses was attached first. The pleadings and the record itself will show that they were attached simultaneously, and both at the time the policy was issued. The one clause refers to the other, and, apparently, makes a portion of the other a part of the contract. That clause is as follows:

"Loss, if any, payable to M. D. Thatcher, Trustee, for The International Trust Company, of Denver, Colorado, as his interest may appear. (Their regular subrogation clause attached to the policy.)"

Here, then, this clause refers to another clause, but says that the subrogation clause is attached to the policy. The other clause referred to is the clause set out at length in the petition for a writ of ceritorari, and in the former part of this brief. The question as to which of these clauses is a part of the contract, or how much of each, is a question of construction. It is, therefore, a law question, and should have been passed upon by the Court of Appeals as a law question simply. But the Court of Appeals saw fit to refer to the clause herein set out as "the first clause," and to the other as "the second clause." The Court said:

"The second clause being more full and complete, and the last apparently to be attached to the policy, should be taken, we think, as containing the latest expression of the intentions of the contracting parties. We are of opinion, therefore, that the last clause supersedes and controls the former so far as they are in conflict."

The Court of Appeals is not at liberty, in order to support the judgment, to make new findings. There was no such finding as that set out by the Court of Appeals made by the trial Court. In fact, there is nothing in the record to show that there was a first or a second clause, and we maintain, therefore, that the two clauses and the policy should be construed together to see what they mean. Our contention is that the words in the one clause, "Their regular subrogation clause attached," mean that only that portion of the so-called International Trust Company clause is in force. We should invoke the rule that where two portions of an instrument are in conflict, that construction should be given to the instrument which will permit all of the clauses or portions of the instrument to stand. By holding that only the subrogation portion of the so-called second clause is in force, we have a completed contract. We have one payee in the policy—viz., M. D. Thatcher, Trustee, and we have the right to subrogation in force and effect, and we avoid the conflict which would necessarily exist were this not so, in having two payees. That certainly was not the intention of the parties. We might further invoke the rule that where one portion of an instrument is written and the other printed, the written portion controls the printed. The Thatcher clause was typewritten and attached to the policy. The other clause was printed, but signed, and attached to the policy.

Written portions of an instrument prevail over the printed.

Franklin Brass Co. vs. Ins. Co., 65 Fed., 775.

Construing, then, the policy and these two mortgage clauses together, we arrive at the conclusion that the payee in the policy is M. D. Thatcher, as Trustee; that Thatcher is nowhere exempted from the acts or conduct of Gordon; that the interest which is insured is Gordon's interest; that Thatcher is merely the payee, and can recover only that which Gordon would be entitled to recover at the time of the fire. If Gordon has no interest, then Thatcher could recover nothing. If Gordon avoids the policy by selling the property, or otherwise makes a forfeiture by a non-compliance with the terms of the policy, then Thatcher can collect nothing. Gordon did avoid the policy, because he sold the property on the 3d of July, 1893.

The rule is well settled that a conveyance of the property in fee by the owner avoids the insurance unless the consent of the company is given to the sale, and a transfer of the policy is made.

Syndicate Ins. Co. vs. Bohn, 65 Fed., 165.
Bates vs. Ins. Co., 10 Wallace, 33.
Grovenor vs. Ins. Co., 17 N. Y., 391.

The fire occurred in October, 1893. Gordon sold the property July 3d, 1893. When the fire occured, then he had no interest in the property; he had no insurance. As Thatcher must recover upon the interest of Gordon, and Gordon had no interest, therefore, Thatcher could not recover.

Carpenter vs. Ins. Co., 16 Pet., 495.

It therefore follows that Thatcher, had he brought this suit, could not have recovered. But it is apparent from the mortgage clause in question that Thatcher was the Trustee for The International Trust Company.

The Code of Colorado provides that the real party in interest may bring the suit. If Thatcher was but the Trustee, and the real party in interest was The International Trust Company, then the suit was properly brought. If so, the Trust Company stands in the place of Thatcher; its recovery is measured by what Gordon would have been entitled to recover, had there been no mortgage clause attached. Consequently, Gordon having sold the property on the 3d of July, there could be no recovery.

We maintain, therefore, that the Court of Appeals should have construed this policy and these two mortgage clauses which is purely a law question and its attempt to inject into the case a new finding was wholly unwarranted. The plaintiff in error in this case ought for this reason, as well as for the others in this brief presented, to be granted a remedy by this Honorable Court, which can only be done by this Court's assuming jurisdiction of this case, and granting this petition for a writ of certiorari.

VI.

The question as to the legal effect of the correspondence was properly presented for review by the appellate Court. That Court is not precluded by the findings of the Trial Court in this behalf.

The fourth question raised under our petition, in the order in which we have undertaken to present the case in this brief, relates to the holding of the majority of the Court of Appeals that the Appellate Court is concluded by the finding of the trial court that "The International Trust Company did on the 12th day of June, 1893, reacquire title to the note of said John R. Gordon by repurchase, and did reacquire an insurable interest in and to the property covered by the policy of insurance issued by defendant company; and the Trust Company did on the 12th day of June, 1893, actually pay to the said Investor's Mortgage Security Company, the sum of $1,750, being part of the amount due upon repurchase; and did assume the payment of the balance of the purchase price, viz., $50,000, and did from that time on treat and dispose of said note as its own property."

Dissenting from the majority of the Court upon this branch of the case, Judge Sanborn said:

"I am unable to concur in the view taken by the majority of the Court, that the question whether or not there was any evidence sufficient to support a finding that The International Trust Company, of Denver, the defendant in error, had an insurable interest in the property destroyed, was not presented for our consideration by the record in these cases. At the close of the evidence counsel for plaintiff in error moved the Court for a finding and judgment in its favor, 'upon the ground that the evidence is insufficient to show a cause of action in favor of the plaintiff company, or to support a finding for the plaintiff company, or to support a judgment entered upon such finding for the plaintiff company,' and this motion was denied and an exception to this ruling of the court was taken. In my view, this motion had the same effect that a request to the Court to instruct the jury peremptorily to find for the defendant would have had if the trial had been before a jury. It is not necessary to pass upon the weight or the sufficiency of the evidence to determine this question of law. It is to be decided like a question which arises upon such a request to the jury—upon the concession that the motion must be denied if there is evidence in the record sufficient to sustain a finding for the plaintiff. Rev. Stat., Sec. 700; Clement vs. Insurance Co., 7 Blatch, 51, 53, 54, 58; Lehen vs. Dickson, 148 U. S. 71, 72, 78; Martinton vs. Fairbanks, 112 U. S. 670, 672, 674; St. Louis vs. Western Union Tel. Co., 148 U. S. 92, 96; Mercantile Trust Co. vs. Wood, 8 C. C. A., 658; 60 Fed. Rep. 346, 348; Searcy County vs. Thompson, 13 C. C. A., 349, 354 to 358; 66 Fed. Rep. 92.

"As all the evidence relating to the insurable interest of the defendant in error consisted of letters contained in the record, this motion in my view raised the question whether or not all reasonable men upon the perusal of these letters would, in the exercise of a sound and unprejudiced judgment, come to the conclusion that these letters did not show that the defendant in error had an insurable interest in the property destroyed."

In view of the divison of the Court of Appeals upon this subject, and in view of the fact that the profession has, as counsel are advised, voiced a very decided dissent from the position taken by the Court of Appeals of this Circuit upon the proposition involved, and in further view of the fact that under the rules thus laid down by the Court of Appeals of this circuit in this and previous cases referred to in the opinion of the majority of the Court, we submit that the profession generally would be greatly benefitted by an authoritative declaration by this Court of the rule which should govern in a case of this sort, involving, as it does, the question as to the correct interpretation of the statute governing the trial of cases without the intervention of a jury. It would be of great value to the profession generally, as well as to the litigants, to have the rights of litigants who have submitted their cases to the Court upon issues both of fact and of law, to have a definite and clear and full exposition of the manner in which cases thus tried must be brought for review before the Appellate Court.

It is the opinion of counsel for the petitioner that it is open to the Appellate Court to review upon the record here presented, the correspondence which passed between the Trust Company and the Mortgage Company relative to the repurchase of the Gordon note, in order that the Appellate Court may say whether, as a matter of law, such a repurchase and reversing of the title was effected thereby as is claimed by the defendant in error.

We say it is open in two ways: First, in the manner recognized by the learned judge who dissented upon this branch of the case from the majority of the Court, viz.: upon the ground that the motion for a judgment made at the close of the testimony was equivalent to a request in a jury trial for a peremptory instruction to return a verdict for the defendant.

And, again, we submit that the question is presented for review upon the ground not considered by the Court of Appeals, viz.: that as shown by the record, page 119, not only did the defendant below move for a judgment upon the evidence, but during the progress of the trial, prior to any findings of fact by the Court, defendant made a specific request for a ruling of law that from the correspondence between The International Trust Company and The Investor's Mortgage Security Company, the ownership and title to the Gordon note did not vest in the Trust Company until after the issuing of defendant's policy. The Court refused to make this ruling, but ruled to the contrary, and the defendant then and there duly excepted. The defendant also asked a ruling that as a matter of law the Trust Company did not have an insurable interest in the property at the time of the issuing of defendant's policy. And to the refusal of the Court so to rule and to the making of a contrary ruling, defendant then and there excepted.

The defendant also asked for a ruling upon the evidence that the Trust Company did not have such an insurable interest either in the property or in the indebtedness as was sufficient in law to sustain the policy, and did not have the insurable interest required by the terms of the policy and mortgage clause. And to the refusal of the Court to make this ruling the defendant excepted at the time. All of this is presented by the bill of exceptions.

The Statute, Sec. 700, provides that: "The rulings of the Court in the progress of the trial of the case, if excepted to at the time and duly presented by bill of exceptions, may be reviewed by the Supreme Court upon a writ of error or upon appeal." And section 649 provides that: "The finding of the Court upon the facts, which may be either general or special, shall have the same effect as the verdict of a jury."

From this we infer that the finding of the Court upon the facts should not have any other or more binding or conclusive effect upon the Court of Appeals than would the verdict of a jury; from which considerations it would follow that both the rulings of the Court upon the propositions of law raised by the evidence in question would be open to review by the Appellate Court, and the refusal of the Court to grant the motion for judgment made at the close of the evidence would be equivalent to a request for a peremptory instruction to return a verdict for the defendant, and would likewise be open to review upon the evidence upon which the request so made was predicated.

In this connection we cite the following authorities in addition to those cited by His Honor, Judge Sanborn:

Lehnen vs. Dickson, 148 U. S., 72.
United States vs. Clark, 96 U. S., 37.
Hamilton vs. Insurance Company, 136 U. S., 243.
Arnold vs. Bailey, 24 S. C., 494.
Dwight vs. Germania Ins. Co., 103 N. Y., 342.
Robinson Mach. Works vs. Chandler, 56 Ind., 575.
Wason vs. Rowe, 16 Vt., 525.
Soap Co. vs. Burns, 2 Col. C. A., 89.
3 Am. & Eng. Encyc. Law, 867.

In this connection it is to be observed that the trial court itself did not find that there was an "unconditional and sole ownership" of the note; nor does the trial court find that there was such an insurable interest as would support the insurance.

The finding of the trial court was that the Trust Company did reacquire "an insurable interest" in the property. This of itself was insufficient, as a finding of fact, to support the judgment.

An insufficient finding of fact by the trial court is equivalent to no finding at all.

United States vs. Black, 94 U. S., 73.

And for a lack of a sufficient finding the cause should be remanded.

Ibid.

The Appellate Court cannot enlarge the findings of the trial court in order to sustain the judgment. In order to sustain the judgment of the trial court the findings of that Court should, in any event, show that the Trust Company had the insurable interest required by the terms of the insurance at the time the policy of defendant company was issued. This the trial court does not find; but finds that the Trust Company reacquired "an insurable interest." But the Appellate Court cannot say that thereby the interest reacquired was sufficient to support this insurance, unless the Court is prepared to go further and to say that there is no distinction between an insurable interest and a sole and unconditional ownership.

VII.

THE COURT OF APPEALS UNJUSTLY REFUSED TO REVIEW QUESTIONS OF LAW PROPERLY RAISED AND PRESENTED TO IT. LITIGANTS ARE ENTITLED TO A REVIEW OF THE ERRORS AND MISTAKES OF A *NISI PRIUS* COURT. THE REFUSAL OF THE COURT OF APPEALS WORKS AN INJUSTICE WHICH THIS COURT WILL REMEDY.

The law of this land guarantees to individuals and corporations the equal protection of their rights and property, and that exact justice shall be meted out to litigants by the Courts. When disputes arise between citizens over their rights or property, those same laws declare that the controversy shall be settled impartially. It often happens that, through mistake, or by reason of the haste necessarily incident to trials in *nisi prius* Courts, or by the prejudice of the trial Judge or of the jury, that litigants do not receive justice at their hands, nor are their rights as individuals preserved to them, nor are the laws administered impartially. To correct such acts of injustice, appellate Courts have been created. Those Courts are expected to review the proceedings of the trial Court, and prevent an abortive and unfair administration of the law. In order that the proceedings of the trial Court may be properly presented to the Appellate Court, either Congress has prescribed laws governing such proceedings, or the Courts have, by reason of their inherent power, prescribed rules therefor. Any change in those laws, or an abridgment of the rules during the course of a litigation, may result in depriving the litigant of his rights. And when, from the record, it is apparent that there has been a miscarriage of justice, the Appellate Court is in duty bound to provide a remedy for the wrong thus inflicted. This is true, whether the injury is effected by the trial Court or by an intermediate Appellate Court. And where the duty is thus made plain, as appears by the record, the highest tribunals in the land are not slow to assume jurisdiction of a cause or controversy in order that justice may be secured to the litigants. This assertion is made, of course, with the proviso that there is nothing in the law which prevents the highest Court from assuming such jurisdiction. No Appellate Court, if it has the jurisdiction, should suffer a suitor to be thrown out of Court without a hearing or a fair chance to present his case on the merits. The Circuit Court of Appeals for the Eighth Circuit has thus practically treated this plaintiff in error. In this instance the Sun Insurance Office has no right of appeal, nor the right to remove the cause from the Circuit Court of Appeals to this Honorable Court by writ of error. But there is a way to invoke the jurisdiction of this Court to correct the great injustice believed to be suffered by this plaintiff in error, at the hands of the Circuit Court of Appeals; and we are here seeking that way, viz.: by a writ of certiorari, directing the Circuit Court of Appeals to send up the proceedings in this case to this Court.

We contend that this Court should assume jurisdiction, and decide this case upon the merits, and correct the errors and mistakes of the trial Court.

The Circuit Court of Appeals refuses to pass upon the questions presented to it for review—questions properly presented, as we conceive, and as this Court has determined, and as that Court at one time decided; but which Court, about the time of the trial of this cause in the *nisi prius* Court, through a practical reversal of its former decisions, now determines is not properly presented for their review. That Court has decided that under sections 649 and 700 of the General Statutes, when a trial is had before the Court without a jury, the Circuit Court of Appeals can only review the sufficiency of the special findings to suport the judgment, and such questions as are presented upon the rejection or admission of testimony during the course of the trial, and that it will not review a correspondence upon which a special finding is based to see whether there is any evidence to support such a finding, even though the question is properly raised at the *nisi prius* trial as a question of law.

In this case the question arose whether the plaintiff below had at the time of the issuance of the policy sued on, *an* insurable interest and *such an* insurable interest in the property insured as called for by the contract. Whether it did have *an* insurable interest, and whether it did have *the* insurable interest called for by the contract, depended entirely upon the correspondence between the plaintiff company and The Investor's Mortgage Security Company, Limited, of Scotland. The record shows that on December 12, 1892, John R. Gordon, of Pueblo, Colorado, borrowed $50,000 of the plaintiff company to complete a hotel building in said city of Pueblo. He executed his promissory note therefor, and secured the same by a deed of trust upon his hotel property. On December 29, 1892, the plaintiff company sold that note to the Investor's Company, without recourse. It fell due June 12, 1893. The Trust Company had had other and various dealings with the Scotch Company, and had sold it other securities than the Gordon note. It acted, and was then acting, as agent for the Scotch Company for collection of the interest upon these securities, including the Gordon note, and the securities themselves, when they fell due. This Gordon note had been forwarded to the Trust Company for collection about the 1st of June, 1893. Assuming that it had authority, the Trust Company had arranged to give Gordon an extension of six months upon the principal of this note. About June 12, 1893, however, the plaintiff company was notified by the Investor's Company that the latter company would require this Gordon note to be paid. On June 12th, the plaintiff company wrote the Investor's Company in Scotland that they had given this extension to Gordon, but *if* the Investor's Company *desired* the plaintiff company would soon arrange to take up the note. No reply to this letter was received by the Trust Company until about the 28th of June, 1893, at which time the Trust Company received a cable, dated June 26th, which was followed by a letter dated June 28th, and received by the Trust Company July 15th. which was followed by a letter dated June 15th. In fact, the Investor's Company, being in Scotland, could not have received this letter of June 12th until some days after June 14th, the date on which the policy in suit was issued.

The record shows and it is conceded that the

Sun Insurance Office was not aware of the sale of the Gordon note by the Trust Company on December 29, 1892, and that it had no knowledge of any of the negotiations between the Trust Company and the Investor's Company until after the fire occurred.

All of the foregoing appears from the correspondence, and from that alone.

At the close of the testimony the plaintiff in error asked the trial Court to rule as a matter of law upon the evidence that from the correspondence between the Trust Company and the Investor's Company relative to the repurchase of the Gordon note and from all the testimony and evidence relating thereto, the ownership and title to the said note *did not rest* in the Trust Company until after the issuance of defendant's policy, which request was denied, and plaintiff in error saved an exception to the ruling of the Court. Plaintiff in error also asked the Court to rule as a matter of law upon all the evidence that the Trust Company did not have *an* insurable interest in the property or in the indebtedness at the time of the issuing of the defendant's policy, and that it did not have *such an* insurable interest either in the property or in the indebtedness as was sufficient in law to sustain the policy, and did not have *the* insurable interest required by the terms of the contract. The Court refused defendant's request and the plaintiff in error duly excepted.

Prior to the requests for said rulings, but at the close of the testimony, the plaintiff in error moved the Court for a finding and judgment for the defendant company, upon the ground that the evidence is insufficient to show a cause of action in favor of the plaintiff company, or to support a finding for the plaintiff company, or to support a judgment entered upon such finding for the plaintiff company. This motion was denied and the defendant excepted to the ruling.

By our request and ruling we asked the nisi prius Court to say that the evidence did not, as a matter of law, show the plaintiff entitled to a finding or judgment, and also whether from the correspondence the Trust Company had repurchased the Gordon note at the time of the issuance of the policy, and thereby acquired an insurable interest, and the insurable interest required by the contract, and by it there was also raised questions whether the Trust Company had complied with the provisions of the contract as to ascertainment of the amount of loss, proof of loss, etc. Those questions, presented in that form are questions of law, raised in the course of the trial, which the nisi prius Court passed upon, which were excepted to, and which the Court of Appeals was asked to review. That Court refused so to do.

Section 649 of the Statutes of the United States reads as follows:

"Issues of fact in civil cases in any Circuit Court may be tried and determined by the Court, without the intervention of a jury, whenever the parties, or their attorneys of record, file with the clerk a stipulation in writing waiving a jury. The finding of the Court, upon the facts, which may be either general or special, shall have the same effect as the verdict of a jury."

Section 700 thereof reads as follows:

"When an issue of fact in any civil cause in a Circuit Court is tried and determined by the Court without the intervention of a jury, according to section 649, the rulings of the Court in the progress of the trial of the cause, if excepted to at the time, and duly presented by a bill of exceptions, may be reviewed by the Supreme Court upon a writ of error or upon appeal, and when the finding is special the review may extend to the determination of the sufficiency of the facts found to support the judgment."

We conceive that any law question presented to the trial Court and passed upon by that Court, and the ruling of the Court excepted to, must be reviewed by the Circuit Court of Appeals.. If this plaintiff Trust Company had no insurable interest at the issuance of the policy, it could not recover in the suit. Whether it did have that insurable interest, depended upon what this correspondence may be said to mean. In other words, this correspondence must be construed, and the construction of a correspondence has at all times been held by this Court to be a question of law for the Court.

Hamilton vs. Ins. Co., 136 U. S., 243.

But the Court of Appeals refused to review the question thus presented, and thereby prevented this litigant from having a fair and inpartial hearing in that Court to correct and remedy the errors and mistakes of the nisi prius Court. As we have said, all that was required of the Appellate Court was to construe this correspondence. But we conceive that even if there was presented to the trial Court the same questions on other evidence than the correspondence, still the questions presented were law questions passed upon by the trial Court, and therefore, properly reviewable. In such manner, the question of whether there had been a compliance with the terms of the contract or policy as to the proofs of loss, the prematurely bringing of suit and the ascertainment of the amount of loss, were properly raised, and the Appellate Court should have examined the testimony to see if there was any testimony to sustain the findings in that regard. That had always been the rule of this Circuit Court of Appeals, until about the time of the trial of this case. In presenting the questions in the nisi prius Court, counsel had religiously followed the rulings of the Circuit Court of Appeals theretofore made. Precisely similar questions had been raised and reviewed by this same Circuit Court of Appeals, as its decisions will show.

That Court said:

"The finding of the Court, whether general or special, performs the office of the verdict of the jury, when it is made and filed the trial is ended. Even the question of whether or not the evidence is sufficient to sustain the finding can only be presented by a request for a peremptory holding that upon the facts the finding must be otherwise."

Citizens' Bank vs. Farwell, 63 Fed., 119.

"The only question the special finding presents that would not be presented by a general finding is whether or not in any view, the facts found in it are sufficient to support the judgment. With the single exception of this question, which is presented by the special finding itself, there are only two methods by which questions of law can be presented to the Court that tries the facts that this Court can review them by writ of error: These methods are: First, by seasonable objections and exceptions to the rulings of the Court upon the admission or rejection of evidence; and, second, by requesting the Court, before the trial is ended, to make declarations of law, and excepting to its refusal to do so and its declarations of law, if any, that do not accord with the propositions asked, in exactly the same way as instructions to a jury would be requested, and the rulings of the Court giving or refusing them would be excepted to, if the trial was before a jury."

Mercantile Trust Co. vs. Wood, 60 Fed., 348.
Walker vs. Miller, 59 Fed., 870.
Atkins vs. Sloance, 61 Fed., 791.
Bank vs. Bank, 61 Fed., 810.

Thus it is seen that the decisions of this very same Court have been strictly followed by counsel for presenting the questions raised in the trial Court on the appeal, and were it not for a change of opinion by a majority of the judges of said Court, there would have been no question but that this plaintiff in error would have had the questions reviewed in the Appellate Court. This change is evidenced by the decision in the case of Hinkley vs. City of Arkansas, 69 Fed. Rept., 768, which was not published at the time of the trial of this case in the nisi prius Court. This same Appellate Court is now divided on the question, and that is another reason why this Court should assume jurisdiction of this cause, and finally pass upon the question thus presented. The effect of the decision of the Circuit Court of Appeals as shown in the case at bar will be to drive every litigant to a trial by a jury. It precludes litigants from submitting to the shorter and less expensive method of having their suits determined by the Court. This decision announces that when a trial Court sits as a jury, a different rule prevails as to the construction of the law than when the same questions arise before a jury. The instructions which a Court gives a jury are reviewable; they are declarations of law. Likewise, when the Court is asked to declare the law by a finding, and he does declare it, that is a declaration of law, which is not reviewable. This is neither sound in reasoning, nor fair in practice, nor wise as a precedent. These requests, rulings and exceptions we conceive raise only questions of law. They are preserved by the record. They apparently come within the provisions of the statute that "the rulings of the Court in the progress of the trial of the cause, if excepted to at the time, and duly presented by bill of exceptions, may be reviewed."

See

Lehnen vs. Dickson, 148 U. S., 72.

Respectfully submitted,

MILTON SMITH,
T. J. O'DONNELL,
W. S. DECKER,

Office Supreme Court U. S.
FILED.
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IN

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OCTOBER TERM, 1895.

THE SUN INSURANCE OFFICE OF LONDON, ENGLAND.
Plaintiff in Error,
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I.

Inasmuch as this Court has repeatedly held that an application for writ of certiorari would be granted only where the petition or record in the case showed that the questions passed upon by the Circuit Court of Appeals were grave and important in their character or that the interests of uniformity of decision required a review, we do not see upon what grounds the present application can be granted.

In re Lau Ow Bew, 141 U. S., 583.

In re Lau Ow Bew, 144 U. S., 47.

In re Woods, 143 U. S., 202.

American Const. Co. vs. Jacksonville & K. W. Ry. Co., 148 U. S., 372.

It has not been shown, nor can it be shown, that there is any diversity of opinion or decision among the various Circuit Courts of Appeals upon any of the questions passed upon and determined by the learned Circuit Court of Appeals for the Eighth Circuit in this case, and we respectfully submit that there is no question of such gravity and importance in this case as justifies the granting of the prayer of the petition.

The questions involved in this case are very concisely and comprehensively set forth in the opinion of the learned Court of Appeals for the Eighth Circuit in the following terse language:

> "The present suits, however, were actions at law on policies that had been duly executed and delivered to the Trust Company prior to the occurrence of the loss. On the trial of the causes a jury was duly waived, and the Circuit Court, at the conclusion of the trial, made and filed a special finding of facts which forms a part of the record in each case. It is unnecessary to set out the special finding of facts in full, as the finding on most of the issues is conceded to be correct. It is also conceded that the facts as found fully support the judgments which were rendered against the respective insurance companies. The chief contention in these cases is that when the policies in suit were issued the Trust Company had no insurable interest in the property."

II.

Six different questions are presented by the petition and are urged as sufficient to justify the Court in granting the writ of certiorari and are as, follows:

1. That the Circuit Court of Appeals erred in holding that the effect of a mortgage clause attached to a policy of insurance was to make a new and separate contract between the mortgagee and the Insurance Company and to effect a separate insurance of the interests of the mortgagee dependent for its validity solely upon the course of action of the mortgagee and the Insurance Company, and unaffected by any act or neglect of the mortgagor, of which the mortgagee is ignorant, whether such act or neglect was done or permitted prior or subsequent to the issue of the mortgage clause.

2. That on the 14th day of June, the date of the policy in controversy, the Trust Company did not have such an interest in the Gordon note and mortgage as gave it an insurable interest in the property covered by the insurance policy.

3. That the Circuit Court of Appeals erred in holding that the findings of fact made by the trial Court was binding upon the Appellate Court.

4. That the Circuit Court of Appeals erred in holding that the question, whether or not the Trust Company had an insurable interest in the property destroyed, was a question of fact rather than one of law.

5. That the Circuit Court of Appeals erred in holding that the finding of fact by the trial Court—

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2. That on the 14th day of June, the date of the policy in controversy, the Trust Company did not have such an interest in the Gordon note and mortgage as gave it an insurable interest in the property covered by the insurance policy.

3. That the Circuit Court of Appeals erred in holding that the findings of fact made by the trial Court was binding upon the Appellate Court.

4. That the Circuit Court of Appeals erred in holding that the question, whether or not the Trust Company had an insurable interest in the property destroyed, was a question of fact rather than one of law.

5. That the Circuit Court of Appeals erred in holding that the finding of fact by the trial Court—

that the suit was not prematurely brought—was binding upon the Appellate Court.

6. That the Circuit Court of Appeals erred in holding that the printed form of mortgagee clause furnished by the Trust Company to the insurance agency, and which was attached to the policy of insurance in controversy, took precedence over a typewritten clause which was inadvertently attached to the policy by the agency.

While we contend that none of the above questions are such as fall within the ruling of this Court defining what are grave and important questions, yet on the other hand, we contend that the ruling of the Court of Appeals upon each and all of them is founded upon well established principles of law and upheld by a long line of judicial decisions.

As to the first point, viz., that the Court erred in its construction of the mortgagee clause attached to the policy, we submit that the contention upon the part of the petitioner is not supported by a single authority within the jurisdiction of the United States. In 1878, the Circuit Court of Appeals of the State of New York rendered a decision defining the effect of a mortgage clause such as the one attached to the policy in this case, and that decision has been upheld and supported by every Court where the same question has been presented since that time, and if insurance companies have not adjusted their business to the principles laid down in that decision, it is their fault. The principles laid down by the Court of Appeals of the State of New York in the case of Hastings vs. Insurance Co., 73 N. Y., 141, have been upheld and approved in the following cases:

Ins. Co. vs. Stanton, 57 Ill., 354.

Fogg vs. Mutual Fire Ins. Co., 10 Cush., 345.

Francis vs. Ins. Co., 7 R. I., 159.

Boynton vs. Clinton, 16 Barb., 254.

Foster vs. Equitable M. F. Ins. Co., 2 Gray, 216.

Ormsby vs. Ins. Co., 58 N. W., 301, 302.

Phoenix Ins. Co. vs. Omaha L. & T. Co., 60 N. W., 133.

May on Insurance, volume 1, section 276.

The Court in this case followed the ruling that it had theretofore laid down in the case of Ins. Co. vs. Bohn, 12 Circuit Court of Appeals, 531; 65 Federal, 165. Counsel for the Insurance Company in that case applied for a re-hearing to the Circuit Court of Appeals, but it did not occur to them that the question involved was one of gravity and importance, as no attempt was made on their part to have the same reviewed by this Court by making application for a writ of certiorari.

In answer to the second contention on the part of the learned counsel for the petitioner, the Circuit Court of Appeals in the decision in this case, uses the following language:

> "The Circuit Court found, however, 'that * * * The International Trust Company did, on the 12th day of June, 1893, re-acquire title to the note of said John R. Gordon by repurchase, and did re-acquire an insurable interest in and to the property covered by the policy of insurance issued by the defendant company, and the Trust Company did, on the 12th day of June, 1893, actually pay to the said Investor's Mortgage Security Company the sum of $1,750, being part of the amount due upon repurchase, and did assume the payment of the balance of the purchase price, viz., $50,000, and from that time on treated and disposed of said note as its own property.'"

It will thus be seen that the trial Court and the Court of Appeals treated the question of the repurchase of the Gordon note as one of fact, which fact they found against the Insurance Company and we confidently submit that this Court will not review the evidence to ascertain whether this ultimate fact has a substantial basis.

As to the third question, that the findings of fact by the trial Court is conclusive upon the Court of Appeals. The ruling of the Court of Appeals is based upon and supported by decisions heretofore rendered by the Circuit Court of Appeals and also by this Court. A sufficient answer to the contention of the petitioner is found in the language of the learned opinion of Judge Thayer, as follows:

> "The rule is inflexible in the Federal Court that when a jury is waived and the Court makes a special finding, an Appellate Court cannot look into the facts upon which the finding is based, except for the purpose of ascertaining whether an error was committed in admitting or excluding testimony."

And in support of the same cites the following authorities:

Stanley vs. Supervisors of Albany, 135 U. S., 535, 547.

Walker vs. Miller, 19 U. S. Ct. App., 403.

Searcy County vs. Thompson, 13 Cir. Ct. App., 349.

But even if the Court in this case had erred in its ruling, that the findings of fact by the trial Court was binding upon it, the petitioner is not in a position to urge this question upon the Court at this time, as the record in this case shows that the Circuit Court of Appeals, in deciding this case, went beyond the special findings as made by the trial Court, and from the evidence and the record in the case came to the conclusion that the Circuit Court did not err in finding that the Trust Company had such an insurable interest as was sufficient to support the policy; and while Judge Sanborn disagreed with his associates as to the binding effect of the special findings upon an Appellate Court, yet he concurred in the decision affirming the judgment of the trial Court, and held that the record showed that the evidence in the case fully justified the trial Court in rendering a judgment against the Insurance Company.

As to the fourth point that is urged—namely, that the Court erred in holding that the question as to whether or not the Trust Company had an insurable interest in the property destroyed, was one of fact instead of one of law, counsel for petitioner inadvertantly misquote the record. They assume that the only evidence upon this point is found in the correspondence which passed between the Trust Company and The Scottish Security Company. While the correspondence was evidence of an insurable interest which the Trust Company had in the property, it was not the only evidence. In this connection the learned Judge of the Eighth Circuit Court of Appeals, who wrote the opinion in this case, uses the following language:

> "It matters not, we think, that the finding in question is based largely upon letters and telegrams which passed between the Trust Company and The Investor's Mortgage Security Company, and upon deductions drawn from such correspondence."

The evidence of Henry W. Hobson, a witness upon the part of the Trust Company, showed that there was an implied agreement or understanding between the Trust Company and the Scottish Company which gave the Trust Company an insurable interest in the Gordon property which was destroyed by fire, irrespective and independent of the correspondence which passed between them relative to the repurchase of the Gordon note; and it is this evidence which the learned Judge evidently had in mind when he penned the language quoted above.

As to the fifth question—viz., that the Circuit Court of Appeals erred in holding that the trial Court erred in its finding that the suit was not prematurely brought—we respectfully call the Court's attention to the 18th, 19th, 20th, 21st and 23d findings of fact as made by the trial Court. These findings of fact are to be found on pages 130 and 131 of the printed record of the Circuit Court of Appeals in this case. Without going into the details of the evidence in this connection, we confidently assert that the evidence in the case, irrespective of the special findings of the trial Court, establish the following:

1. That on November 3d, 1893, more than sixty days prior to the institution of the suit, proofs of loss were furnished in accordance with the requirements of the policy.

2. That the Insurance Company, from the time of the fire, denied liability upon grounds foreign to the matter of proofs of loss, and upon grounds arising prior to the fire.

3. That the plaintiff in error, after the fire, made a tender of the premium to the Trust Company, denied its liability under the policy, and claimed the right to cancel the same.

4. That the suit in this case was not brought until after the expiration of sixty days from the furnishing of satisfactory proofs of loss.

Willis vs. Ins. Co., 79 N. C., 285.

Speatoley vs. Ins. Co., 1 Dill., 392.

Erwin vs. Ins. Co., 24 Mo. App., 145.

Jones vs. Ins. Co., 117, N. Y., 103.

Bumstead vs. Ins. Co., 12 N. Y., 81.

McMaster vs. Ins. Co., 55 N. Y., 222.

Ins. Co. vs. McDowell, 50 Ill., 120-125.

The defense that the suit was prematurely brought is in the nature of a plea in abatement, and it is well established by the authorities that a plea in abatement cannot be made along with a plea on the merits of a case, and unless interposed before pleading to the merits, it is waived.

Gould on Pleading, 5th Ed., 141, 269, 270, 536.

Oregonian Ry. Co. vs. Oregon R. & N. Co., 22 Fed., 245, 248.

Cuthbert vs. Galloway, 35 Fed., 46.

Heidenrich et al. vs. Aetna Ins. Co., 37 Pac., 64.

Imperial Refrigerator Co. vs. Wyman, 38 Fed., 574.

Shepard vs. Gross, 14 How., 505.

The Civil Code of Procedure of Colorado, which is the New York Code, sections 50 and 54, in relation to pleas, reads as follows:

"50. The defendant may demur to the complaint within the time required in the summons to answer, when it appears upon the face thereof, either, first, that the Court has no jurisdiction of the person of the defendant, or the subject of the action; or, second, that the plaintiff has no legal capacity

> to sue; or, third, that there is another action pending between the same parties for the same cause; or, fourth, that there is a defect or misjoinder of parties, plaintiff or defendant; or, fifth, that several causes of action have been improperly united; or, sixth, that the complaint does not state facts sufficient to constitute a cause of action; or, seventh, that the complaint is ambiguous, unintelligible and uncertain."
>
> "54. When any of the matter enumerated as demurrable do not appear on the face of the complaint, the objection may be taken by answer."

Judge Wheeler, in the Circuit Court of the United States for the Southern District of New York, in passing upon similar provisions of the New York Code, held that these provisions of the Code did not alter the common law rule of pleading, and that a defense which was but a plea in abatement was waived by pleading to the merits.

Cuthbert vs. Galloway, 35 Federal, 466.

As to the sixth point, viz.: that the Court of Appeals erred in holding that the mortgage clause furnished by the Trust Company, and which was attached to the policy, controlled and governed, we think a sufficient answer to this is found in the following language used by the Circuit Court of Appeals:

> "The point is made that the first of these mortgage clauses controls the second, and that as the first clause does not exempt the Trust Company from liability for the acts of the mortgagor, the policy of the Sun Insurance Office was voided by the sale made by the mortgagor on July 3d, 1893. We cannot assent to this view. The second mortgage clause, being more full and complete, and the last, apparently, to be attached to the policy, should be taken, we think, as containing the latest expression of the intentions of the contracting parties. We are of

opinion, therefore, that the last clause supersedes and controls the former in so far as they are in conflict. The result is that the judgment of the Circuit Court in each of the cases now under consideration must be affirmed."

III.

We respectfully submit:

1st. That the petition in this case does not present any question of gravity and importance such as would warrant this Court in granting the prayer of the petition; and,

2d. That the Court of Appeals clearly stated the law relative to the questions involved in the case.

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M T M Rob[illegible]

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